Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

AVAILABILITY OF BOUND VOLUMES

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 86-50)

Reimbursable Service—Excess Cost of Preclearance Operation

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., February 2, 1986.

Notice is hereby given that pursuant to Section 24.18(d), Customs Regulations (19 CFR 24.18(d)), the biweekly reimbursable excess costs for each preclearance installation are determined to be as set forth below and will be effective with the pay period beginning February 2, 1986.

Installation	Biweekly excess cost
Montreal, Canada	$22,043
Toronto, Canada	33,125
Kindley Field, Bermuda	12,273
Nassau, Bahama Islands	18,800
Vancouver, Canada	16,372
Winnipeg, Canada	3,483
Freeport, Bahama Islands	16,356
Calgary, Canada	9,893
Edmonton, Canada	6,592

D. LYNN GORDON,
Acting Comptroller.

[Published in the Federal Register, February 24, 1986 (51 FR 6496)]

(T.D. 86-51)

Guidelines for Release of Seized and Forfeited Property to State and Local Law Enforcement Agencies

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of guidelines for disposition of seized and forfeited property.

SUMMARY: This document sets forth the Customs policy regarding the disposition of seized and forfeited property. This action is necessary to implement those provisions of the Comprehensive Crime Control Act of 1984 and the Trade and Tariff Act of 1984 concerning the transfer of seized and forfeited property to state and local law enforcement agencies that assisted Customs in the seizure of forfeiture. This action is consistent with Customs efforts to enhance and promote cooperation with state and local law enforcement agencies.

EFFECTIVE DATE: February 25, 1986.

FOR FURTHER INFORMATION CONTACT: Stuart P. Seidel, Assistant Chief Counsel (Enforcement and Operations), Office of the Chief Counsel, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 ((202) 566-2482).

SUPPLEMENTARY INFORMATION:

Background

I. Statement of Policy.

Customs is authorized by various laws enforced or administered by the Customs Service to seize property for violations of the Customs, navigation and related laws. Pursuant to § 618, Tariff Act of 1930, as amended (19 U.S.C. 1618), any person with an interest in the seized property may petition for relief and the Secretary of the Treasury may mitigate or remit any fine, penalty or forfeiture incurred with respect to the violation. Property which is not released in response to a petition under 19 U.S.C. 1618 or other provisions of law may be disposed of in accordance with the provisions of § 616, Tariff Act of 1930 (19 U.S.C. 1616, 1616a), which was added to the United States Code by the Comprehensive Crime Control Act of 1984 (P.L. 98-473) and the Trade and Tariff Act of 1984 (P.L. 98-573). The guidelines contained in this document implement the asset forfeiture provisions of § 616.

Customs statutory authority regarding releasing seized and forfeited property to state and local agencies is nearly identical to that of the Department of Justice. Customs participated in the drafting of the Department of Justice guidelines which were published in the Federal Register on June 7, 1985 (50 FR 24052), and the following guidelines and procedures correspond to the Justice guidelines and procedures as closely as possible.

Section 616 directs the Secretary of the Treasury to "ensure the equitable transfer * * * of any forfeited property to the appropriate state or local law enforcement agency so as to reflect generally the contribution of any such agency participating directly in any of the acts which led to the seizure or forfeiture of such property."

This authority is consistent with Customs purpose of promoting cooperative law enforcement efforts. Custom intends to manage its asset forfeiture program in a manner designed to enhance this federal, state and local cooperation.

Customs is authorized to dispose of forfeited property by (1) retaining the property for official use; (2) transferring custody or ownership of the property to any federal, state or local agency pursuant to § 616 or (3) placing the forfeited cash or proceeds of sale of forfeited property in a special Customs forfeiture fund. A decision of the appropriate Customs official regarding placing the forfeited property into official use or transferring the property to another agency is not subject to judicial review.

Local Customs officials will inform state and local law enforcement agencies as to the procedures for requesting an equitable transfer of forfeited property, help facilitate the application for transfer of such property, and see that the spirit and letter of the forfeiture provisions of the Comprehensive Crime Control Act of 1984 and the Trade and Tariff Act of 1984 are implemented.

II. Definitions.

A. *"Commissioner"* means the Commissioner of Customs or his designee.

B. *"Local Customs official"* means the special agent in charge if the Customs officers participating in the seizure were assigned to the Office of Enforcement, or the district director if the Customs officers participating in the seizure were assigned to the Office of Inspection and Control. In rare cases, if the participating Customs officers are from offices which do not report to the special agent in charge or the district director, the term refers to the equivalent field office (if there is one) or the regional or Headquarters office which supervises the participating Customs officers. In cases of doubt, requests for equitable distribution may be submitted by other law enforcement agences directly to Customs Headquarters, but no action will be taken until the local Customs official has reviewed the request.

C. *"Regional Customs official"* means the Regional Commissioner of Customs or the individual designated by the Regional Commissioner (usually the Assistant Regional Commissioner (Enforcement)) to review requests for equitable distribution of seized property.

D. *"Appropriate Headquarters official"* means the Assistant Commissioner of Customs who supervises the Customs officers participating in the seizure. If the seizure involved Customs officers in dif-

ferent functional areas, the Assistant Commissioners for the concerned functional areas must jointly approve any transfer.

E. *"Property or assets"* means tangible property and cash.

F. *"Cash"* means currency, negotiable instruments and securities.

G. *"State and local agencies"* means law enforcement agencies of a state, the District of Columbia, Puerto Rico or any territory or possession of the U.S. or of any local government within the listed governments.

H. *"Appraised value"* means fair market value.

III. Transfer of Seized and Forfeited Property to State and Local Law Enforcement Agencies.

A. *Customs Service Seizures*

1. Commissioner's Authority for Equitable Transfer of Seized Property:

a. Section 616, Tariff Act of 1930, as amended, authorizes the Commissioner to transfer property seized by Customs officers to any other Federal agency, or to state or local law enforcement agencies that directly participated in the act which led to the seizure and forfeiture.

b. Tangible property not retained for official use by the federal seizing agency may be equitably transferred.

c. Where a participating law enforcement agency petitions for a share in the forfeited property, the Commissioner shall determine an equitable transfer of the property that generally reflects the relative contribution of the participating agencies.

2. Procedure for Determining Equitable Transfer:

a. Any state or local law enforcement agency that participates in the acts leading to a Customs seizure for forfeiture may file a request for an equitable transfer of the property.

b. The criteria for determining the equitable transfer of the property will be the same for all requests.

c. In all cases the final decision-making authority rests with the Commissioner.

3. Requests from Participating Law Enforcement Agencies:

a. Within 30 days following the seizure for forfeiture, the state or local agency shall submit a written request for an equitable transfer of the property subject to forfeiture to the local Customs official responsible for the Customs law enforcement effort resulting in the seizure for forfeiture.

b. If more than one local Customs office was involved in the law enforcement effort resulting in the seizure, the request should be forwarded by the local office receiving the request to the appropriate regional Customs official. If more than one region was involved, the request should be forwarded by the local office receiving the request through this regional office to the appropriate Customs Headquarters official.

c. The request must include the following information:

(1) Identification of the property against which the claim is made;

(2) Details regarding the requesting agency's participation, including the amount of money and manpower expended by the State or local agency in pursuing the case;

(3) A statement of the intended use for the property;

(4) A designation of the proper fiscal officer to whom cash or check disbursements can be made;

(5) A designation of the proper official to whom transfer documents should be delivered by the U.S.;

(6) A designation of the proper party to whom possession should be delivered;

(7) A statement indicating that the transfer is not prohibited under the applicable state or local law;

(8) In instances of a joint application by several state or local agencies, the relative share of each state or local agency;

(9) A statement that all fees and expenses necessary to effect transfer of title will be paid by or on behalf of the requesting agency not later than the time of transfer; and

(10) The extent to which transferred funds will be credited directly to the budget of the state or local agency involved, resulting in an increase of law enforcement resources for that state or local agency.

d. The requesting agency must certify that the information contained in items 3.c. (4) and (7) above is true and correct.

e. An information copy of the request for an equitable transfer will be forwarded by the local Customs official to the Fines, Penalties and Forfeitures Officer in the district office responsible for processing the forfeiture and a copy to the Seized Property Division in the Office of the Comptroller at Headquarters.

f. If a request for the property has been made, no report of seizure should be made by Customs to the General Services Administration.

4. Procedure for Processing Requests for Equitable Transfer:

a. In all cases, the local Customs official receiving the request will prepare a written report that will evaluate the degree of assistance provided by the requesting agency or agencies in the underlying law enforcement action resulting in the seizure for forfeiture. Where more than one local or regional office participated, the request should be expeditiously sent through the other Customs participants for their approval or comment.

b. The equitable share for a participating state or local agency should generally reflect the contribution of the agency participating directly in any of the acts which led to the seizure for forfeiture of the property including, but not limited to, the following factors:

(1) which agency initiated the case;

(2) which agency identified the asset;

(3) the amount of money and manpower expended by the state or local agency in pursuing the case;

(4) whether or not the state or local agency seized other assets during the course of the same investigation and whether such seizures were made pursuant to state or local law; and

(5) whether or not the state or local agency could have achieved forfeiture under state law, with favorable consideration given to a state or local agency which would have forfeited the asset(s) on its own but joined forces with the U.S. to make a more effective investigation.

c. In cases in which a state or local agency has filed a request for an equitable share of that property, the Commissioner may still decide to place property forfeited administratively or judicially into official use or transfer the property to any other federal agency.

(1) In making that decision, the following factors must be considered:

(a) the relative needs of the requesting law enforcement agency, Customs, and any other federal agency for the particular asset;

(b) the uniqueness of the asset and the likelihood of securing such an asset through other seizures in the near future;

(c) the relative significance of the requesting law enforcement agency's participation in the case, as well as all other factors pertinent to the determination of equitable distribution as set forth in item 4.b. above;

(d) the likelihood that the requesting agency will be eligible for an equitable share of property from additional seizures arising from the same investigation or from other seizures in the near future;

(e) the impact that a decision to place the property into official use might have on federal, state or local relations; and

(f) any extraordinary expenses associated with the seizure, including any informants awards which may be payable.

5. Decision-Making Authority for Determining Equitable Transfer:

a. Except as indicated in item 5.c. below, the equitable distribution of a forfeited asset with an appraised value of $250,000 or less will be determined by the appropriate Headquarters official.

(1) The local Customs official receiving a request shall forward his report and recommendation through the appropriate regional official to the appropriate Headquarters official.

(2) In making this decision, consideration will be given to the report and recommendation forwarded by the local Customs official, and a written ruling on the request will be issued by the appropriate Headquarters official through the appropriate regional official and the local Customs official to the requesting party.

(3) A copy of the written ruling will be forwarded to the district director having custody of the seized or forfeited asset and the

Seized Property Division in the Office of the Comptroller at Headquarters.

b. In the case of property valued at greater than $250,000, the evaluation and recommendation will be forwarded to the appropriate Headquarters official who will forward a final recommendation to the Commissioner. The Commissioner will determine the equitable distribution of those assets.

(1) In making this decision, the Commissioner will consider the reports and recommendations forwarded by the appropriate Headquarters official and, in the case of assets with an appraised value of $750,000 or greater, will consult with the Assistant Secretary of the Treasury (Enforcement and Operations). A written ruling on the request will be prepared by the Assistant Commissioner (Enforcement) and, after signature by the Commissioner, will be issued through the appropriate regional official and sent to the local Customs official for delivery to the requesting party.

(2) A copy of the written ruling will be forwarded to the district director having custody of the seized or forfeited asset and the Seized Property Division in the Office of the Comptroller at Headquarters.

c. The appropriate regional Customs official may make an equitable distribution of a forfeited conveyance with an appraised value of $25,000 or less if the participating Customs officers were assigned to his/her region.

(1) In making this decision, the regional Customs official will consider the reports and recommendations forwarded by the local Customs official and issue a decision through that official to the requesting party.

(2) A copy of the decision document will be forwarded to the district director having custody of the seized or forfeited asset and to the Seized Property Division in the Office of the Comptroller at Headquarters.

6. Proceeds Placed in the Customs Forfeiture Fund:

a. If the federal forfeiture action is not deferred, and the property is not placed into official use or transferred to a state or local agency, it will be sold and the proceeds of sale, after deducting expenses, etc., will be placed in the Customs Forfeiture Fund.

b. Forfeited cash will be placed in a suspense account pending deposit in the Customs Forfeiture Fund.

7. Disposition of Forfeited Property:

a. State or local agencies may share in seized and forfeited tangible property, and seized and forfeited cash. In the case of seized and forfeited cash, the equitable share of any state or local agency shall be determined after applying the criteria in items 4.b. and 4.c. above.

b. Any property that cannot be used for official Customs, federal, state or local purposes must be destroyed or sold or otherwise disposed of in accordance with law.

c. Where tangible property is transferred to qualifying state or local agencies, the Customs Forfeiture Fund and appropriated monies will not be used to pay liens or mortgages on the transferred property, to equip the property for law enforcement purposes, or to pay salaries.

d. The recipient state or local agency must pay the valid liens and mortgages on the forfeited tangible property prior to the transfer of such property.

e. The recipient state or local agency may be required to pay expenses pertaining directly to the seizure prior to the transfer of tangible property.

f. Prior to any interlocutory or immediate sale of property pending forfeiture, the district director having custody of the property must consult with any other involved local Customs official and the U.S. Attorney, Criminal Division section chief, or the Director of the Asset Forfeiture Office, Department of Justice, to determine the evidentiary status of the property and the status of any state or local law enforcement agency requests for equitable sharing.

g. All Customs officers will promptly notify the district director having custody of seized property of any facts affecting such seized property. Relevant facts would include bills, invoices, orders of mitigation and remission, orders of designation for official use, and appraisals. Based upon these and other factors, the district director's office should ensure the proper disposition of the property.

B. *Seizures involving the participation of other federal agencies*

1. Where a state or local agency requests equitable distribution of property which was seized through the participation of a federal agency other than Customs, the local Customs official shall send a copy of the request to the other agency for its review and recommendation.

2. Where a state or local agency requests equitable distribution of property which was seized as part of an OCDETF (Organized Crime/Drug Enforcement Task Force) or joint Customs/DOJ (Department of Justice) case, the request should be reviewed by the U.S. Attorney (or DOJ attorney-in-charge) and submitted to Customs Headquarters with their recommendations. If Customs Headquarters disagrees with the U.S. Attorney (or DOJ attorney-in-charge) recommendations, the matter shall be referred to the Assistant Secretary of the Treasury (Enforcement and Operations). If necessary, the Assistant Secretary and the appropriate Justice Department official shall review the recommendations and make the decision.

3. Where the only participating federal agency is an agency other than Customs (the Coast Guard, for example), and Customs is merely the custodian, the other agency shall review the request and make the recommendation to Customs Headquarters.

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE PROVISIONS

This document provides guidelines concerning internal Customs procedures and is designed to promote efficient use of personnel, facilities, and resources and to promote cooperative law enforcement efforts. It has no effect on the general public. Accordingly, pursuant to 5 U.S.C. 553(b)(B) and (d)(3), notice and solicitation of comments is unnecessary and good cause is found for dispensing with a delayed effective date for adoption of the new guidelines.

DRAFTING INFORMATION

The principal author of this document was Susan Terranova, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

JOHN P. SIMPSON,
Acting Commissioner of Customs.

Approved: January 14, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury,

[Published in the Federal Register, February 25, 1986 (51 FR 6608)]

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19 CFR Parts 12 and 178

(T.D. 86-52)

Customs Regulations Amendments Concerning Convention on Cultural Property Implementation Act

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by adding provisions to implement the Convention on Cultural Property Implementation Act. The Convention addressed the problem of illicit importing and exporting of items of cultural property, that is, items of importance for archaeology, prehistory, history, literature, art, or science. These regulations are designed to prohibit illicit traffic in cultural property while allowing the exchange of natural treasures for legitimate scientific, educational, and cultural purposes. The regulations are effective for all importations of cultural property, and archaeological and ethnological material, subject to the Convention.

EFFECTIVE DATE: March 31, 1986.

FOR FURTHER INFORMATION CONTACT: Legal Aspects: Samuel Orandle, Entry Procedures and Penalties Division (202-

566–5765); Operational Aspects: Louis Alfano, Duty Assessment Division (202–566–8651); U.S. Customs, Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Beginning in the late 1960's, the U.S. began participating in negotiations, sponsored by the United Nations Educational, Scientific and Cultural Organization (UNESCO), addressing the problem of illicit international trade in cultural property. Cultural property was defined as property which, on religious or secular grounds, is specifically designated by a country as being important in the archaeology, prehistory, history, literature, art, or science of that country.

The value of cultural property, whether archaeological or ethnological in nature, is immeasurable. Such items often constitute the very essence of a society and convey important information concerning a people's origin, history, and traditional setting. The importance and popularity of such items regrettably makes them targets of theft, clandestine excavation of archaeological sites and accompanying illegal importing and exporting.

There has been growing concern in the U.S. regarding the need for protecting endangered cultural property. The appearance in the U.S. of stolen or illegally exported artifacts from other countries where there has been recent pillaging has, on occasion, strained our foreign and cultural relations. This situation, combined with the concerns of the museum, archaeological, and scholarly communities, was recognized by the President and Congress. Codes of ethics and professional standards were formally developed by these communities. It became apparent that it was in the national interest for the U.S. to join with other countries to control illegal trafficking of such articles in international commerce.

The U.S. joined international efforts and actively participated in negotiations resulting in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Owernship of Cultural Property (823 U.N.T.S. 231 (1972)). U.S. acceptance of the 1970 UNESCO Convention was codified into U.S. law as the "Convention on Cultural Property Implementation Act" (Pub. L. 97–446, 96 Stat. 2329 at 2350). The spirit of the Convention was enacted into law to promote U.S. leadership in achieving greater international cooperation toward preserving cultural treasures that are of importance not only to the nations whence they originate, but also to greater international understanding of mankind's common heritage. In 1983 the U.S. became the first major art importing country to implement the 1970 Convention.

It was with these goals in mind that Customs issued interim regulations to carry out the policies of the Act. The interim regulations were published in the Federal Register as T.D. 85–107 on

June 25, 1985 (50 FR 26192), and took effect immediately. However, comments on the interim regulations were invited for consideration before final regulations were issued.

Analysis of Comments

One commenter conveyed strong support for the intent of the regulations while expressing a general concern for what he termed "weaknesses and ambiguities". However, the commenter stated the weakness was the result of the Convention and the implementing Act, and therefore, could not be corrected in the regulations. Customs does not believe the regulations are weak. However, we cannot address specifics since the commenter did not raise any specific points.

The remaining 4 commenters were more detailed in their submissions. Comments they raised and Customs replies are as follows.

Comment: The definition of "museum" in § 12.104(e) should be attributed to its source, the Museum Services Act (Pub. L. 94–462, 20 U.S.C. 968).

Reply: Customs agrees and has added the reference. Also, Customs is adopting a comment that clarifies the point that "recognized museum" under the Act is synonymous with "museum".

Comment: The regulations should clarify how the Secretary of the Treasury will select a museum or other institution to temporarily hold a seized article of archaeological or ethnological material, or article of seized cultural property. Also, the regulations should provide for reimbursement to a museum or institution holding such an article or piece of property if the object requires special care or more security than normal.

Reply: As written, § 12.104f contains reference to the two basic criteria the Secretary will use in determining which museum or institution, if any, will be given an article or material seized under these regulations, for temporary display. These factors are: the safety that will be provided the article or material, and the museum or institution's assurances, backed by a sufficient bond, that the article or material will be returned to the Secretary upon request. This decision is left to the Secretary's discretion and these regulations are not the proper forum for a listing of specifications concerning museums or institutions. The Secretary will consider such requests by museums or institutions on a case-by-case basis.

As to the comment requesting a regulation providing financial assistance to a museum or institution seeking to temporarily house a seized article or material, Customs is aware of no statutory authority requiring that such aid be made available. To the contrary, Customs believes such a provision is contraindicated by the Secretary's requirement of selecting a museum or institution that is financially able to assure the item's safe return.

Comment: Customs failure to prepare a regulatory impact statement is improper. The regulations will have the kind of impact which requires a regulatory impact statement.

Reply: Customs disagrees. These regulations will only have a minor impact on the general public. Persons who trade in archaeological and ethnological material, or in cultural property, will be more affected. Certain documentation or evidence will be required upon importation of articles or materials designated by agreements or emergency actions as coming under the protection of the Act. Customs would characterize this as a minor impact. Customs does not believe that these regulations will result in any significant economic costs, and no comments to the contrary were submitted.

Comment: Customs BACKGROUND statement in the interim regulations was unwarranted and improper. Although the text of the interim regulations correctly specifies which prohibitions pertain to which types of property, Customs BACKGROUND statement may lead to unnecessary confusion.

Reply: Customs agrees that the term, "cultural property", may have been used broadly in the BACKGROUND section of the interim regulations. We regret if any statements made may have appeared too strongly worded.

The intent of the BACKGROUND section was to convey the urgency of the problem the interim regulations were designed to address. We do not believe the wording was misleading or confusing to a degree requiring that these regulations be reissued with another opportunity to comment. In fact, the commenter raising these points also states the interim regulations themselves correctly set out the prohibitions pertaining to different types of articles or materials.

Comment: Portions of the interim regulations are inconsistent with the Act.

Reply: Customs agrees that there are some instances where the interim regulations diverged slightly from the Act. To correct this, the following changes have been made to the final regulations.

(1) In § 12.104(a)(1), the word, "and" is being added after paragraph (a)(1)(ii), and the phrase, "or in addition to paragraphs (a)(1)(i) and (ii) of this section" is being added after paragraph (a)(1)(iii).

(2) In § 12.104a(a), reference is made to articles of cultural property stolen from "such institution". The corrected phrase in the final regulations is "such museum, monument, or institution".

(3) In § 12.104a(b) in the interim regulations, a phrase was omitted. The proper wording of § 12.104a(b) as it appears in the final regulations is as follows: No archaeological or ethnological material designated pursuant to 19 U.S.C. 2604 and listed in § 12.104g, that is exported (whether or not such exportation is to the U.S.) from the State Party after the designation of such material under 19 U.S.C. 2604 may be imported into the U.S. unless the State Party

issues a certificate or other documentation which certifies that such exportation was not in violation of the laws of the State Party.

(4) In § 12.104b, the introductory paragraph is changed to read, "The following is a list of State Parties and the date of entry into force for each State Party:". Also, Zambia is added in proper alphabetical order with a date of entry into force of September 21, 1985.

(5) In § 12.104c(a), the phrase, "is filed with the district director," is moved from the end of the paragraph to immediately after the word "Secretary".

(6) In § 12.104d, reference is made to the, "certificate or evidence". The corrected phrase in the final regulations is "certificate, documentation, or evidence".

(7) In § 12.104g, the word "Convention" is changed to "Convention on Cultural Property Implementation Act" to properly reflect the source of the protections provided items and categories of protected materials.

Comment: One commenter requested clarification of whether the documentation accompanying an importation of designated archaeological or ethnological material might also apply to importations of cultural property. The commenter, representing research libraries, was concerned over the burden a broad interpretation of these regulations would impose on research libraries obtaining rare manuscripts and incunabula from sources outside the U.S.

Reply: The documentation required for importations of designated archaeological and ethnological material does not apply to importations of rare manuscripts, incunabula, or other items of cultural property.

After consideration of all of the comments received in response to publication of the interim regulations, and further review of the matter, it has been determined to adopt the regulations in final form with the modifications previously discussed.

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, a regulatory impact analysis is not required.

Regulatory Flexibility Act

Pursuant to § 3 of the Regulatory Flexibility Act (Pub. L. 96-353, 5 U.S.C. 301 *et seq.*), it is hereby certified that the regulations set forth in this document will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

LIST OF SUBJECTS IN 19 CFR PARTS 12, 178

PART 12
Customs duties and inspection, Imports, Exports.
PART 178
Reporting and recordkeeping requirements, Paperwork requirements, Collections of information.

AMENDMENTS TO THE REGULATIONS

Parts 12 and 178, Customs Regulations (19 CFR Parts 12, 178), were amended on an interim basis by the publication of T.D. 85-107, in the Federal Register on June 25, 1985 (50 FR 26193). These parts are now amended in final in the following manner:

PART 12—SPECIAL CLASSES OF MERCHANDISE

1. The authority citation for Part 12 continues to read as follows:

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (Gen. Hdnote 11, Tariff Schedules of the United States), 1624.

§ 12.104 et seq. also issued under 19 U.S.C. 2612.

2. Part 12 is further amended by adding a new unit titled, "Cultural Property", designated §§ 12.104–12.104i to read as follows:

CULTURAL PROPERTY

Sec.

§ 12.104 Definitions.

For purposes of §§ 12.104 through 12.104i:

(a) The term, "archaeological or ethnological material of the State Party" to the 1970 UNESCO Convention means—

(1) Any object of archaeological interest. No object may be considered to be an object of archaeological interest unless such object—

(i) Is of cultural significance;

(ii) Is at least 250 years old; and

(iii) Was normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or under water; or in addition to paragraphs (a)(1) (i) and (ii) of this section;

(iv) Meets such standards as are generally acceptable as archaeological such as, but not limited to, artifacts, buildings, parts of buildings, or decorative elements, without regard to whether the particular objects are discovered by exploration or excavation;

(2) Any object of ethnological interest. No object may be considered to be an object of ethnological interest unless such object—

(i) Is the product of a tribal or nonindustrial society, and

(ii) Is important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development or history of that people;

(3) Any fragment or part of any object referred to in paragraph (a) (1) or (2) of this section which was first discovered within, and is subject to export control by the State Party.

(b) The term "Convention" means the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property adopted by the General Conference of the United Nations Educational, Scientific, and Cultural Organization at its sixteenth session (823 U.N.T.S. 231 (1972)).

(c) The term "cultural property" includes articles described in Article 1 (a) through (k) of the Convention, whether or not any such article is specifically designated by any State Party for the purposes of Article 1. Article 1 lists the following categories:

(1) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;

(2) Property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;

(3) Products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;

(4) Elements of artistic or historical monuments or archaeological sites which have been dismembered;

(5) Antiquities more than 100 years old, such as inscriptions, coins and engraved seals;

(6) Objects of ethnological interest;

(7) Property of artistic interest, such as:

(i) Pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);

(ii) Original works of statuary art and sculpture in any material;

(iii) Original engravings, prints and lithographs;

(iv) Original artistic assemblages and montages in any material;

(8) Rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;

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(9) Postage, revenue and similar stamps, singly or in collections;

(10) Archives, including sound, photographic and cinematographic archives;

(11) Articles of furniture more than 100 years old and old musical instruments.

(d) The term "designated archaeological or ethnological material" means any archaeological or ethnological material of the State Party which—

(1) Is—

(i) Covered by an agreement under 19 U.S.C. 2602 that enters into force with respect to the U.S., or

(ii) Subject to emergency action under 19 U.S.C. 2603 and

(2) Is listed by regulation under 19 U.S.C. 2604.

(e) The term "museum" means a public or private nonprofit agency or institution organized on a permanent basis for essentially educational or esthetic purposes, which, utilizing a professional staff, owns or utilizes tangible objects, cares for them, and exhibits them to the public on a regular basis (Museum Services Act; Pub. L. 94-462; 20 U.S.C. 968). For the purposes of these regulations, the term "recognized museum" under the Cultural Property Implementation Act shall be synonymous with "museum".

(f) The term "Secretary" means the Secretary of the Treasury or his delegate, the Commissioner of Customs.

(g) The term "State Party" means any nation which has ratified, accepted, or acceded to the 1970 UNESCO Convention.

(h) The term "United States" or "U.S.", includes the customs territory of the United States, the U.S. Virgin Islands and any territory or area the foreign relations for which the U.S. is responsible.

§ 12.104a Importations prohibited.

(a) No article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which was stolen from such museum, monument, or institution after April 12, 1983, or after the date of entry into force of the Convention for the State Party, whichever date is later, may be imported into the U.S.

(b) No archaeological or ethnological material designated pursuant to 19 U.S.C. 2604 and listed in § 12.104g, that is exported (whether or not such exportation is to the U.S.) from the State Party after the designation of such material under 19 U.S.C. 2604 may be imported into the U.S. unless the State Party issues a certificate or other documentation which certifies that such exportation was not in violation of the laws of the State Party.

§ 12.104b State parties to the convention.

(a) The following is a list of State Parties, and the date of entry into force for each State Party:

State Party	Date of entry into force
Algeria	Sept. 24, 1974.
Argentina	Apr. 11, 1973.
Bolivia	Jan. 4, 1977.
Brazil	May 16, 1973.
Bulgaria	Apr. 24, 1972.
Cameroon	Aug. 24, 1972.
Canada	June 28, 1978.
Central African Republic	May 1, 1972.
Cuba	Apr. 30, 1980.
Cyprus	Jan. 19, 1980.
Czechoslovakia	May 14, 1977.
Democratic Kampuchea	Dec. 26, 1972.
Democratic People's Republic of Korea	Aug. 13, 1983.
Dominican Republic	June 7, 1973.
Ecuador	Apr. 24, 1972.
Egypt	July 5, 1973.
El Salvador	May 20, 1978.
German Democratic Republic	Apr. 16, 1974.
Greece	Sept. 5, 1981.
Guatemala	Apr. 14, 1985.
Guinea	June 18, 1979.
Honduras	June 19, 1979.
Hungary	Jan. 23, 1979.
India	Apr. 24, 1977.
Iran	Apr. 27, 1975.
Iraq	May 12, 1973.
Italy	Jan. 2, 1979.
Jordan	June 15, 1974.
Kuwait	Sept. 22, 1972.
Mauritania	July 27, 1977.
Mauritius	May 27, 1978.
Mexico	Jan. 4, 1973.
Nepal	Sept. 23, 1976.
Nicaragua	July 19, 1977.
Niger	Jan. 16, 1973.
Nigeria	Apr. 24, 1972.
Oman	Sept. 2, 1978.
Pakistan	July 30, 1981.
Panama	Nov. 13, 1973.
Peru	Jan. 24, 1980.
Poland	Apr. 30, 1974.
Portugal	Mar. 9, 1986.
Qatar	July 20, 1977.
Republic of Korea	May 14, 1983.
Saudi Arabia	Dec. 8, 1976.

State Party	Date of entry into force
Senegal	Mar. 9, 1985.
Socialist People's Libyan Arab Jamahiriya	Apr. 9, 1973.
Spain	Apr. 10, 1986.
Sri Lanka	July 7, 1981.
Syrian Arab Republic	May 21, 1975.
Tunisia	June 10, 1975.
Turkey	July 21, 1981.
United Republic of Tanzania	Nov. 2, 1977.
United States of America	Dec. 2, 1983.
Uruguay	Nov. 9, 1977.
Yugoslavia	Jan. 3, 1973.
Zaire	Dec. 23, 1974.
Zambia	Sept. 21, 1985.

(b) Additions to and deletions from the list of State Parties will be accomplished by Federal Register notice, from time to time, as the necessity arises.

§ 12.104c Importations permitted.

Designated archaeological or ethnological material for which entry is sought into the U.S., will be permitted entry if at the time of making entry:

(a) A certificate, or other documentation, issued by the Government of the country of origin of such material in a form acceptable to the Secretary is filed with the district director, such form being, but not limited to, an affidavit, license, or permit from an appropriate, authorized State Party official under seal, certifying that such exportation was not in violation of the laws of that country, or

(b) Satisfactory evidence is presented to the district director that such designated material was exported from the State Party not less than 10 years before the date of such entry and that neither the person for whose account the material is imported (or any related person) contracted for or acquired an interest, directly or indirectly, in such material more than 1 year before that date of entry, or

(c) Satisfactory evidence is presented to the district director that such designated material was exported from the State Party on or before the date on which such material was designated under 19 U.S.C. 2604.

(d) The term "satisfactory evidence" means—

(1) For purposes of paragraph (b) of this section—

(i) One or more declarations under oath by the importer, or the person for whose account the material is imported, stating that, to the best of his knowledge—

(A) The material was exported from the State Party not less than 10 years before the date of entry into the U.S., and

(B) Neither such importer or person (or any related person) contracted for or acquired an interest, directly or indirectly, in such material more than 1 year before the date of entry of the material; and

(ii) A statement provided by the consignor, or person who sold the material to the importer, which states the date, or, if not known, his belief, that the material was exported from the State Party not less than 10 years before the date of entry into the U.S. and the reasons on which the statement is based; and

(2) For purposes of paragraph (c) of this section—

(i) One or more declarations under oath by the importer or the person for whose account the material is to be imported, stating that, to the best of his knowledge, the material was exported from the State Party on or before the date such material was designated under 19 U.S.C. 2604, and

(ii) A statement by the consignor or person who sold the material to the importer which states the date, or if not known, his belief, that the material was exported from the State Party on or before the date such material was designated under 19 U.S.C. 2604, and the reasons on which the statement is based.

(e) *Related persons.* For purposes of paragraphs (b) and (d) of this section, a person shall be treated as a related person to an importer, or to a person for whose account material is imported, if such person—

(1) Is a member of the same family as the importer or person of account, including, but not limited to, membership as a brother or sister (whether by whole or half blood), spouse, ancestor, or lineal descendant;

(2) Is a partner or associate with the importer or person of account in any partnership, association, or other venture; or

(3) Is a corporation or other legal entity in which the importer or person of account directly or indirectly owns, controls, or holds power to vote 20 percent or more of the outstanding voting stock or shares in the entity.

§ 12.104d Detention of articles; time in which to comply.

In the event an importer cannot produce the certificate, documentation, or evidence required in § 12.104c at the time of making entry, the district director shall take the designated archaeological or ethnological material into Customs custody and send it to a bonded warehouse or public store to be held at the risk and expense of the consignee until the certificate, documentation, or evidence is presented to such officer. The certificate, documentation, or evidence must be presented within 90 days after the date on which the material is taken into Customs custody, or such longer period as may be allowed by the district director for good cause shown.

§ 12.104e Seizure and forfeiture.

(a) Whenever any designated archaeological or ethnological material is imported into the U.S. in violation of 19 U.S.C. 2606, and the importer states in writing that he will not attempt to secure the certificate, documentation, or evidence required by § 12.104c, or such certificate, documentation, or evidence is not presented to the district director before the expiration of the time provided in § 12.104d, the material shall be seized and summarily forfeited to the U.S. in accordance with Part 162 of this chapter.

(1) Any designated archaeological or ethnological material which is forfeited to the U.S. shall, in accordance with the provisions of Title III of Pub. L. 97–446, 19 U.S.C. 2609(b):

(i) First be offered for return to the State Party;

(ii) if not returned to the State Party be returned to a claimant with respect to whom the designated material was forfeited if that claimant establishes—

(A) valid title to the material;

(B) that the claimant is a bona fide purchaser for value of the material; or

(iii) if not returned to the State Party under paragraph (a)(1)(i) of this section or to a claimant under paragraph (a)(1)(ii) of this section, be disposed of in the manner prescribed by law for articles forfeited for violation of the customs laws. No return of material may be made under paragraph (a)(1) (i) or (ii) of this section unless the State Party or claimant, as the case may be, bears the expenses incurred incident to the return and delivery, and complies with such other requirements relating to the return as the Secretary shall prescribe.

(b) Whenever any stolen article of cultural property is imported into the U.S. in violation of 19 U.S.C. 2607, such cultural property shall be seized and forfeited to the U.S. in accordance with Part 162 of this chapter.

(1) Any stolen article of cultural property which is forfeited to the U.S. shall, in accordance with the provisions of Title III of Pub. L. 97–446, 2609(c):

(i) First be offered for return to the State Party in whose territory is situated the institution referred to in 19 U.S.C. 2607 and shall be returned if that State Party bears the expenses incident to such return and delivery and complies with such other requirements relating to the return as the Secretary prescribes; or

(ii) if not returned to such State Party, be disposed of in the manner prescribed by law for articles forfeited for violation of the customs laws.

§ 12.104f Temporary disposition of materials and articles.

Pending a final determination as to whether any archaeological or ethnological material, or any article of cultural property, has been imported into the U.S. in violation of 19 U.S.C. 2606 or 19

U.S.C. 2607, the Secretary may permit such material or article to be retained at a museum or other cultural or scientific institution in the U.S. if he finds that sufficient safeguards will be taken by the museum or institution for the protection of such material or article; and sufficient bond is posted by the museum or institution to ensure its return to the Secretary.

§ 12.104g Specific items or categories designated by agreements or emergency actions.

(a) [Reserved]

(b) A list of specific items or categories designated by agreements or emergency actions as coming under the protection of the Convention on Cultural Property Implementation Act will from time to time, as the necessity arises, be published in the Federal Register by means of a general notice.

§ 12.104h Exempt materials and articles.

The provisions of these regulations shall not apply to—

(a) Any archaeological or ethnological material or any article of cultural property which is imported into the U.S. for temporary exhibition or display, if such material or article is rendered immune from seizure under judicial process by the U.S. Information Agency, Office of the General Counsel and Congressional Liaison, pursuant to the Act entitled "An Act to render immune from seizure under judicial process certain objects of cultural significance imported into the United States for temporary display or exhibition, and for other purposes", approved October 19, 1965 (22 U.S.C. 2459); or

(b) Any designated archaeological or ethnological material or any article of cultural property imported into the U.S. if such material or article—

(1) Has been held in the U.S. for a period of not less than 3 consecutive years by a recognized museum or religious or secular monument or similar institution, and was purchased by that institution for value, in good faith, and without notice that such material or article was imported in violation of these regulations, but only if—

(i) the acquisition of such material or article has been reported in a publication of such institution, any regularly published newspaper or periodical with a circulation of at least 50,000 or a periodical or exhibition catalog which is concerned with the type of article or materials sought to be exempted from these regulations,

(ii) such material or article has been exhibited to the public for a period or periods aggregating at least 1 year during such 3-year period, or

(iii) such article or material has been cataloged and the catalog material made available upon request to the public for at least 2 years during such 3-year period;

(2) If paragraph (b)(1) of this section does not apply, has been within the U.S. for a period of not less than 10 consecutive years and has been exhibited for not less than 5 years during such period in a recognized museum or religious or secular monument or similar institution in the U.S. open to the public;

(3) If paragraphs (b) (1) and (2) of this section do not apply, has been within the U.S. for a period of not less than 10 consecutive years and the State Party concerned has received or should have received during such period fair notice (through such adequate and accessible publication, or other means, as the Secretary or his designee shall prescribe) of its location within the U.S.; and

(4) If none of the preceding subparagraphs apply, has been within the U.S. for a period of not less than 20 consecutive years and the claimant establishes that it purchased the material or article for value without knowledge or reason to believe that it was imported in violation of law.

§ 12.104i Enforcement.

In the customs territory of the United States, and in the U.S. Virgin Islands, the provisions of these regulations shall be enforced by appropriate customs officers. In any other territory or area within the U.S., but not within such customs territory or the U.S. Virgin Islands, such provisions shall be enforced by such persons as may be designated by the President.

Part 178, Customs Regulations (19 CFR Part 178), was also amended by the interim regulations issued as T.D. 85–107. The Office of Management and Budget control number issued to these regulations remains the same and is retained in § 178.2.

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for Part 178 continues to read as follows:

AUTHORITY: 5 U.S.C. 301, 19 U.S.C. 1624, 44 U.S.C. 3501 et seq.

§ 178.2

2. Section 178.2 is amended by inserting, in proper numerical order, the following entry:

19 CFR section	Description	OMB Control No.
12.104c 12.104e	Certificates and other documentation relating to the importation of items of cultural property.	1515–0147

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: February 3, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, February 26, 1986 (51 FR 6905)]

(T.D. 86-53)

Petitioner's Desire To Contest Decision Denying Domestic Interested Party Petition Concerning Reclassification of Operatic and Theatrical Costumes

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of petitioner's desire to contest decision on domestic interested party petition.

SUMMARY: This document advises the public of the desire of an interested party to contest Customs decision denying its petition requesting reclassification of certain imported operatic and theatrical costumes rented to U.S. opera and theater companies. The petitioner has advised Customs of its intention to file an action in the U.S. Court of International Trade.

DATE: February 25, 1986.

FOR FURTHER INFORMATION CONTACT: Harold Singer, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-2938).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On November 23, 1984, a notice was published in the Federal Register (49 FR 46162) indicating that Customs had received a petition from a domestic interested party filed under § 516, Tariff Act of 1930, as amended (19 U.S.C. 1516), requesting that imported operatic and theatrical costumes rented to U.S. opera and theater companies be classified as dutiable under the appropriate provisions of Schedule 3, Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202), for wearing apparel.

The costumes are imported for the use of certain opera and theater companies in the U.S. They are rented by the U.S. companies for the duration of a particular production, and then returned to the foreign exporter. They are currently classifiable under the provision for "regalia" in item 851.30, TSUS, and entitled to entry free of duty. This provision exempts from duty any articles imported for the use of any public library, any other public institution, or any nonprofit institution established for educational, scientific, literary, or philosophical purposes, or for the encouragement of the fine

arts. It is Customs opinion that opera and theater companies are such nonprofit institutions established to encourage the fine arts.

In support of its position that imported operatic and theatrical costumes are not classifiable as "regalia" under item 851.30, TSUS, the petitioner made the argument that past Customs rulings do not support the use of item 851.30, TSUS, for the duty-free importation of the costumes. The petitioner stated that these rulings apply under item 851.30, TSUS, specifically to situations in which: (1) The costumes are the property of the non-profit institution using them; (2) only a nominal admission fee to defray expenses will be charged; or (3) the performers using the costumes are not reimbursed for their services. The costumes, it was claimed, cannot therefore be used in any commercial activity. The petitioner contended that the costumes are the property of the foreign rental companies, not the opera and theater companies using them, that more than nominal admission fees to defray expenses are charged for opera and theater performances, that the opera and theater performers are often handsomely reimbursed for their services, and that the costumes are used in a commercial activity. Petitioner therefore concluded that the importation of the costumes under the duty-free provisions of item 851.30, TSUS, was a misapplication of that provision.

Six comments were received in response to the November 23, 1984, notice. Three of the commenters supported the current classification of opera and theater costumes as regalia. The arguments of the other commenters, including the petitioner's, challenging Customs current classification, are as follows:

(1) Operatic and theatrical costumes do not meet the plain and ordinary definition of "regalia";

(2) The term "regalia" is defined by Headnote 2, Part 4, Schedule 8, TSUS, as "only such insignia of rank or office, emblems or other articles as may be worn upon the person or borne in the hand during public exercises of the institution * * *" and commercial performances of operas and plays, albeit by a nonprofit organization, for which substantial admission charges are made, cannot be equated with "public exercises";

(3) The legislative history of item 851.30, TSUS, indicates that regalia is to symbolize a given organization as an institution and costumes rented out to different organizations do not symbolize any particular organization;

(4) Most imported costumes are used in profit-making theatrical productions for which performers receive enormous salaries and for which ticket prices are very expensive; and

(5) The requirement under item 851.30, TSUS, that regalia may be imported as the property of a nonprofit institution is not met where the costumes are rented.

DECISION ON PETITION AND NOTICE OF PETITIONER'S DESIRE TO CONTEST

After careful analysis of the comments received in response to the notice and further review of the matter, by letter dated November 6, 1985 (CLA–2 CO:R:CV:V, 553575 HS), the petitioner was informed through its counsel that Customs is of the opinion that the current classification is correct, and that the petition was therefore denied.

Item 851.30, TSUS, provides for the duty-free treatment of regalia imported for the use of "any library, any other public institution, or any nonprofit institution established for educational, scientific, literary or philosophical purposes, or for the encouragement of the fine arts. In reaching its decision affirming the classification of the costumes as regalia, Customs found the petitioner's and the other commenters' arguments challenging the current classification to be unpersuasive. First, it was noted that the definition of regalia in Headnote 2, Part 4, Schedule 8, TSUS, rather than the plain and ordinary definition, governs the use of the term in item 851.30, TSUS. That headnote specifically includes articles other than insignia or emblems and, according to the Tariff Classification Study of 1960, "almost any article which is worn upon the person or borne in hand during public exercises of the institution is regalia if it is not an article of furniture or fixtures, regular wearing apparel, or personal property of individuals." While some performances may require clothing that is indistinguishable from ordinary wearing apparel, it is clear that these types of costumes should not be treated as regalia as the headnote specifically excludes regular wearing apparel.

Second, it is clear to us that a nonprofit opera or theatrical company is a nonprofit institution for the encouragement of the fine arts and that performances of such organizations are "public exercises" of such institutions. If performances of such organizations are not "public exercises" of such organizations, we are at a loss at determining what would be considered a public exercise of these organizations. The regalia provision would have no meaning for nonprofit theatrical and opera companies if their performances were not considered public exercises.

Thirdly, the cost of tickets for a performance and payments made by opera companies to outstanding performers who further the nonprofit objectives of the institution are irrelevant to the question of whether an institution is engaged in commercial activity as long as the institution is nonprofit. We do emphasize, however, that for an opera or theatrical company to take advantage of the regalia provision, it must be shown that the institution is registered as a nonprofit organization under § 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)).

Fourthly, regarding the argument that the legislative history of item 851.30, TSUS, indicates that regalia is to symbolize a given or-

ganization as an institution, we could find no language in the legislative history that supports this assertion.

Finally, regarding the comment that regalia that is rented is not the property of the nonprofit institution, the requirement set forth in the TSUS entitling regalia to duty-free treatment is that the articles be imported for the use of the nonprofit institution. It is our view that rental use is sufficient and purchase is not necessary as long as the importer acquires the proprietary economic interest in the articles.

In response to Customs decision to deny the petition, on December 5, 1985, the petitioner filed notice of its desire to contest the decision in accordance with § 516(c), Tariff Act of 1930, as amended (19 U.S.C. 1516(c)), and § 175.23, Customs Regulations (19 CFR 175.23).

Customs has reconsidered the matter in light of the petitioner's letter of notice of its desire to contest the November 6, 1985, decision. We remain of the opinion that the decision is correct. That decision will stand in the absence of a contrary judgment rendered by the U.S. Court of International Trade or the U.S. Court of Appeals for the Federal Circuit.

AUTHORITY

This notice is published under the authority of § 516(c), Tariff Act of 1930, as amended (19 U.S.C. 1516(c)), and § 175.24, Customs Regulations (19 CFR § 175.24).

DRAFTING INFORMATION

The principal author of this document was Susan Terranova, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: February 3, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, February 25, 1986 (51 FR 6611)]

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19 CFR Part 4

(T.D. 86-54)

Customs Regulations Amendment Adding Norway to List of Countries Whose Pleasure Vessels are Entitled To Be Issued U.S. Cruising Licenses

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by adding Norway to the list of countries whose pleasure vessels may be issued U.S. cruising licenses. Customs has been informed that yachts used and employed exclusively as pleasure vessels belonging to any resident of the U.S. are allowed to arrive at and depart from Norwegian ports and cruise in the waters of Norway without being subjected to formal entry and clearance procedures. Therefore, Customs is extending reciprocal privileges to pleasure vessels belonging to any resident of Norway.

EFFECTIVE DATE: These privileges became effective for Norway on December 18, 1985.

FOR FURTHER INFORMATION CONTACT: John Mathis, Carriers, Drawback and Bonds Division (202–566–5706), U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

Background

Section 4.94(a), Customs Regulations (19 CFR 4.94(a)), provides that U.S. vessels documented as yachts, used exclusively for pleasure, not engaged in any trade, and not violating the customs or navigation laws of the U.S. may proceed from port to port in the U.S. or to foreign ports without entering and clearing, as long as they have not visited hovering vessels.

Generally, foreign-flag yachts entering the U.S. are required to comply with the laws applicable for foreign vessels arriving at, departing from, and proceeding between ports of the U.S. However, as provided in § 4.94(b), Customs Regulations (19 CFR 4.94(b)), pleasure vessels from certain countries may be issued cruising licenses which exempt them from formal entry and clearance procedures (e.g., filing manifests, obtaining permits to proceed and paying entry and clearance fees) at all but the first port of entry in the U.S. Yachts or pleasure vessels not carrying passengers or merchandise in trade are exempt from paying tonnage tax and light money in any case pursuant to § 4.21(b)(5), Customs Regulations (19 CFR 4.21(b)(5)). Cruising licenses are available to pleasure vessels of countries which extend reciprocal privileges to U.S. pleasure vessels. A list of these countries is set forth in § 4.94(b).

By diplomatic note dated November 29, 1985, the Norwegian Royal Ministry of Foreign Affairs informed the American Embassy in Olso, Norway, that the Government of Norway permits yachts used and employed exclusively as pleasure vessels and belonging to any resident of the U.S., to arrivc at and depart from ports of Norway and cruise the waters of Norway without entering and clearing Norwegian Customs, and without the payment of any charges for entering or clearing, dues, duty per ton, tonnage taxes,

or charges for cruising licenses. The embassy conveyed this information to the Department of State, which in turn informed Customs Headquarters by a letter dated December 13, 1985. The Carriers, Drawback and Bonds Division of Customs is of the opinion that satisfactory evidence has been furnished to establish the reciprocity required in § 4.94(b). Therefore, on January 14, 1986, the Director of that division determined that, effective retroactively to December 18, 1985, Norway should be added to the list of countries set forth in § 4.94(b).

By virtue of the authority vested in the President by § 5 of the Act of May 28, 1908, 35 Stat. 425, as amended (46 U.S.C. 104), the President has delegated the authority to issue these cruising licenses to the Secretary of the Treasury by E.O. 10289, September 17, 1951. By Treasury Department Order 165–25, the Secretary of the Treasury delegated authority to the Commissioner of Customs to prescribe regulations relating to § 4.94(b) and other sections of the Customs Regulations relating to lists of countries entitled to preferential treatment in Customs matters because of reciprocal privileges accorded to vessels and aircraft of the U.S. Subsequently, by Customs Delegation Order No. 66 (T.D. 82–201), dated October 13, 1982, the Commissioner delegated authority to amend this section to the Assistant Commissioner (Commercial Operations), who redelegated this authority to the Director, Office of Regulations and Rulings, who then redelegated it to the Director, Regulations Control and Disclosure Law Division.

FINDING

On the basis of the information received from the Government of Norway and the Department of State, as described above, it has been determined that the U.S. is in possession of satisfactory evidence regarding the passage of U.S. pleasure vessels through the ports and waters of Norway without their being subjected to formal entry and clearance procedures. Therefore, Norway is added to the list of countries whose pleasure vessels may be issued U.S. cruising licenses.

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

Because this amendment merely implements a statutory requirement and involves a matter in which the majority of the public is not particularly interested, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure thereon are unnecessary. Further, for the same reasons good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553(d)(1).

THE REGULATORY FLEXIBILITY ACT

This document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). That Act does not apply to any regulation such as this for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), or any other statute.

EXECUTIVE ORDER 12291

This amendment does not meet the criteria for a major regulation as defined in § 1(b) of E.O. 12291. Accordingly, a major impact analysis is not required.

DRAFTING INFORMATION

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 4

Customs inspection and duties, Imports, Vessels, Yachts.

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The authority citation for Part 4 continues to read as follows:

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C. 3, 2103.

§ 4.94 also issued under 19 U.S.C. 1433, 1434, 1435, 1441; 46 U.S.C. 91, 104, 313, 314.

4.94 [Amended]

2. Section 4.94(b), Customs Regulations (19 CFR 4.94(b)), is amended by inserting, in appropriate alphabetical order, the word, "Norway", to the list of countries whose yachts or pleasure vessels may be issued U.S. cruising licenses.

Date: February 20, 1986.

B. JAMES FRITZ,
Director,
Regulations Control and Disclosure Law Division.

[Published in the Federal Register, February 26, 1986 (51 FR 6904)]

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC.

The following are decisions of the United States Customs Service which are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

B. JAMES FRITZ,
Director,
Regulations Control and Disclosure Law Division.

(C.S.D. 86-6)

This ruling holds that a foreign trade zone grantee or operator is not, in normal circumstances, responsible under 19 U.S.C. 81n for prospective charges for additional Customs services which involve a departed zone tenant and removed zone merchandise.

January 31, 1983
For-1-CO:R:CD:D
214744 L

Re: Decision on Application for Further Review of Protest Nos. 4105-2-000001 and 4105-1-000003

DEAR SIR: The above captioned protests and applications for further review were filed against demands for payment of certain charges for Customs supervision at the Toledo Foreign-Trade Zone, billed on a total of 11 invoices dated from July 21, 1981, through December 22, 1981. Our decision follows:

Issue: The basic issue raised is whether charges for additional Customs services required at a foreign-trade zone (FTZ) are chargeable to the operator of the FTZ when those services are performed outside of the precincts and limits of the FTZ.

Facts: The Protestants are the grantee of an FTZ and the former operator of the FTZ. The bills, or more accurately, portions of bills protested, relate to services provided by Customs with respect to a tenant of the FTZ but which were performed subsequent to termination of the tenant's tenancy at the FTZ and apparently subse-

150-146 O - 86 - 3

quent to the time protestant FTZ operator stopped operating the FTZ and was succeeded by another firm as operator.

The sequence of events, as set out by the Protestants, is as follows. For a period of years ending in October 1980, a company was a tenant in a FTZ, and maintained a sizable inventory of merchandise in the FTZ. The Protestant former operator of the FTZ was the operator of the FTZ during the tenancy of that company.

At some time in or prior to March 1978, it is stated, Customs officers apparently became concerned with the integrity of the inventory of the above company's merchandise at the FTZ and began an investigation, the nature and scope of which is unknown to the Protestants. The method of investigation included comparison of inventory records of the company's merchandise "lots" with subsequent inventories of the same "lots." As a result of the investigation, Customs commenced to issue a series of claims for liquidated damages for duty due on merchandise said to have been found missing from each lot. These claims were addressed to Protestant FTZ grantee, and although not so stated, apparently were against the grantee's foreign-trade zone bond.

The FTZ bond is voluntarily tendered and is conditioned upon the removal of FTZ guards for other than the FTZ's normal business hours and guarantees the payment of all duties and taxes on such merchandise as may be removed from the FTZ without a proper Customs permit or otherwise be missing from the FTZ.

The claims were forwarded by the grantee to the operator and by the operator to the tenant company. The tenant company has contested the claims, taking the position that none of its merchandise was in fact missing.

In any event, investigation of the tenant by Customs is said to have resulted in a substantial increase in Customs charges for services at the FTZ, which were periodically billed to the grantee. During the tenure of the tenant at the FTZ, these charges were paid to Customs by the FTZ operator, who was in turn reimbursed by the tenant for that portion of the charges attributable to the tenant. The amount of the charge to the tenant was based upon rate and hour information furnished to the FTZ operator by Customs.

In October of 1980, the tenant discontinued its operation in the FTZ and removed its goods from the FTZ. It appears that prior to its departure from the FTZ, the tenant asked Customs to take all necessary steps to expedite the removal of their inventory from the FTZ. It further appears that in order to expedite the removal of the merchandise from the FTZ, Customs agreed that, when feasible, the paperwork necessary to accomplish the lot reconciliation typically performed at the time of constructive transfer would be performed after the removal of the merchandise, and therefore after departure of the tenant from the FTZ.

It is at this point in the sequence of events that the facts fail us. The Protestants deny ever making any such agreement with Customs and that Customs has been unresponsive to its inquiries concerning with whom Customs did make the agreement. Customs, on the other hand, has acknowledged that there is no record of the agreement but submits that all parties at the time, including the Protestants, were aware that extensive inventory discrepancies existed with the tenant's merchandise.

Following the tenant's departure and removal of its goods from the FTZ, Customs continued to issue demands for liquidated damages for goods of the former tenant said to be missing from the FTZ and to bill the FTZ operator for zone services which included substantial sums in respect to the former tenant's affairs. These billings are said to commence with an invoice dated May 19, 1981, although the first invoice which is the subject of these protests is dated July 21, 1981.

In the meantime, the Protestant former FTZ operator had terminated its operations at the FTZ and began succeeded by another firm as FTZ operator; it continues, however, to be responsible to the FTZ grantee for Customs charges arising out of the tenant's tenure.

Initially, Protestants attempted to handle the Customs charges for zone services attributed to the tenant by paying Customs and seeking reimbursement from the former tenant. However, the former tenant refused to pay, claiming the charges were not proper.

All charges billed have been paid and Protestants now claim a refund of $15,070.71, said to be that portion of the charges for zone Customs services attributable to the former tenant after that tenant's departure from the FTZ. However, the charges, the subject of the protests, appear to total $12,639.87.

Law and analysis: In our opinion, the question to be decided is one of fact, not of law. Protestants claim that Customs' concurrence in removal of the tenant's goods was obtained without their knowledge or permission. Section 146.5, Customs Regulations (19 CFR 146.5), requires the written concurrence of the grantee (or its delegate) to remove merchandise from a zone except where there is provision for the making of applications by the grantee itself or where the grantee is permitted to file specific or blanket approvals.

We find no evidence in the file of the written concurrence or blanket approval of the grantee for the removal of the goods from the zone. Neither do we find any evidence in the file that Protestants explicitly or implicitly agreed to the cost of Customs zone services performed subsequent to removal of the merchandise and departure of the tenant from the zone, although certainly the Protestant zone operator, at least, knew or should have known that the merchandise was being removed from the zone and tacitly concurred in that removal.

Nevertheless, we cannot interpret that tacit approval to constitute an unwritten agreement on the part of the Protestants to be responsible for any prospective charges involving a departed tenant and removed merchandise.

This is not to say, of course, that Protestants could not have agreed to be responsible for such charges, nor that under different circumstances the charges protested would not be proper.

Indeed, although in view of the result we have arrived at we do not believe it necessary to consider Protestant's arguments on the propriety of the charges, we would note that nothing in the statutory provisions on foreign-trade zones limits the scope of the "additional Customs services required" to on-site service. Customs has broad discretion to determine what service is required to carry out its statutory mandate, and is statutorily authorized to be reimbursed for the cost of such service by the grantee of the zone. Thus, if Customs officers are performing functions relating to protection of the revenue or to admission of foreign merchandise into Customs territory or any other function required under the statutory provisions on foreign-trade zones, Customs has authority to assess zone grantees for the cost of those services.

Holding: For the foregoing reasons, you are instructed to allow Protest Nos. 4105–2–000001 and 4105–1–000003 in the amount attributable to charges for Customs services incurred in connection with the departed zone tenant subsequent to its departure from the zone. As it is not necessary to the result, we do not rule on the propriety of the disputed charges.

(C.S.D. 86–7)

This ruling holds, pursuant to 19 U.S.C. 1563(a) and 19 CFR 158.21, that merchandise in a foreign trade zone which is destroyed beyond recovery by act of God, explosion, or fire is not subject to the assessment of U.S. Customs duties as liability for duties only arises upon transfer to Customs territory.

October 17, 1983
FOR–1–CO:R:CD:D
216240 L

Issue: If, through an act of God, explosion, or major conflagration, merchandise being held in a foreign-trade zone (FTZ) were destroyed, would the destroyed material be subject to the assessment of U.S. Customs duties?

Facts: In the specific case, high value merchandise carrying a relatively high rate of duty is admitted to a FTZ for subsequent removal. It is stored in a building constructed of steel framing, masonry walls to eight feet with steel siding to twenty-two feet. The building is fully sprinklered with an automatic alarm system connected directly to the fire department. Despite this, the possibility exists that an act of God, explosion, or major fire could occur.

It is suggested that should this happen, and as a result merchandise is damaged beyond recovery that, subject to inspection by Customs, the material would be declared destroyed and no duty assessed. Further, that if there is recoverable waste it would be taxed relevant to its condition when entered for consumption. A number of reasons are advanced to support this suggestion.

Law and analysis: Section 3 of the Foreign-Trade Zones Act of 1934, as amended (19 U.S.C. 81c), provides in part that:

> Foreign * * * merchandise of every description * * * may, without being subject to the Customs laws of the United States * * * be brought into a zone * * * but when foreign mechandise is * * * sent from a zone into Customs territory of the United States it shall be subject to the laws and regulations of the United States affecting imported merchandise.

General Headnote 1 of the Tariff Schedules of the United States provides that:

> All articles imported into the Customs territory of the United States from outside thereof are subject to duty or exempt therefrom as prescribed in general headnote 3.

Foreign merchandise in a FTZ is imported into the United States but is not in the Customs territory of the United States. Such merchandise is not subject to duty until it is brought into the Customs territory. The voluntary Bond of Foreign-Trade Zone Operators guarantees the payment of all duties and taxes on merchandise removed from a FTZ without a proper Customs permit or which is otherwise missing from the zone, but would not be exercised where merchandise was destroyed in a FTZ by an act of God, explosion, or fire so long as the merchandise destroyed could be suitably accounted for. Accordingly, while Customs inspection may be necessary to establish that merchandise in a FTZ was in fact destroyed, duty cannot be assessed on merchandise in a FTZ.

We believe it pertinent at this point to emphasize that "destroyed" is interpreted to mean destruction as an article of commerce. If articles are destroyed to such an extent that they are valuable in commerce only as scrap they are still articles in commerce and cannot be said to have been destroyed. A diminution in value is not sufficient. The article, to be destroyed, must have no value. This can present a difficult problem as some commodities cannot be economically destroyed and some other commodities cannot actually be destroyed within the judicial definition because they easily can be reclaimed. For example, some metal scrap easily can be reclaimed from a landfill by use of a crane and magnet.

Recoverable waste resulting from an act of God, etc., and attributable to merchandise in nonprivileged foreign status or which may be commingled with domestic merchandise which has lost its identity pursuant to 19 CFR 146.23(c), if entered for consumption, would be classifiable and subject to duty in its condition at time of

removal from the FTZ. With respect to such merchandise in privileged foreign status, 19 CFR 146.21(d) provides that status as privileged foreign merchandise and the consequent determination of duties cannot be abandoned. We note that an act of God can be defined as an occurrence that is due entirely to the forces of nature and that could not reasonably have been prevented. The explosion or fire mentioned is also considered to be a fortuitous occurrence. As such, we do not consider the damage or destruction of privileged foreign merchandise in a FTZ by such an occurrence to be a manufacture or manipulation resulting in recoverable waste within the meaning of 19 CFR 146.21(d) and 19 CFR 146.48(a)(3).

Where nonprivileged or privileged foreign merchandise that has been constructively transferred is destroyed by an act of God, etc., before physical removal from the FTZ the merchandise shall be considered to be in Customs territory, 19 CFR 146.47(c). As such, relief may be available pursuant to 19 U.S.C. 1563(a) and 19 CFR 158.21 *et seq.* Note, however, *Camilo E. Rosello, Inc.* v. *United States,* C.D. 3935 (1969), holding that merchandise that has been released is not in Customs custody and that no refund of duties may be allowed under 19 U.S.C. 1563(a). See also 19 CFR 146.47(f) and 19 CFR 142.19 concerning release of merchandise. Constructively transferred merchandise that has not been released may be restored to zone status pursuant to 19 CFR 146.47 (d) or (e).

Holding: Merchandise in a FTZ destroyed by an act of God, explosion, or fire is not subject to the assessment of U.S. Customs duties as liability for duties only arises upon transfer to Customs territory. Recoverable waste attributable to nonprivileged foreign merchandise, if entered for consumption, would be dutiable in its condition at the time of its removal from the FTZ. Recoverable waste attributable to privileged foreign merchandise, if sent into Customs territory, would be dutiable as determined at the time the privilege was requested.

(C.S.D. 86-8)

This ruling holds that imported merchandise entered for warehouse and thereafter withdrawn from warehouse and exported is not eligible for drawback under the substitution provision of the same condition drawback law, 19 U.S.C. 1313(j)(3).

Oct 24, 1985
DAR-1-09-CO:R:DC:D
218032 RB

Issue: Is imported merchandise which is entered for warehouse eligible for drawback under the substitution provision of the same condition drawback law, 19 U.S.C. 1313(j)(3), if it is thereafter withdrawn from warehouse and exported?

Law and analysis: The express provisions relating to drawback under 19 U.S.C. 1313 fundamentally do not apply to imported mer-

chandise until "after its release from the custody of the Government," (19 U.S.C. 1558 (a) and (a)(1)); 19 CFR 191.132(a); H. Rept. 7, 71st Cong., 161 (1929); S. Rept. 999, 96th Cong., 23 (1980); also see *Atlas Fibers Co.* v. *United States,* 30 Cust. Ct. 247, 254–255, C.D. 1528, aff'd 42 C.C.P.A. 65, C.A.D. 572). It is also acknowledged in this regard that same condition drawback, subsection (j), "would apply to (imported) articles entered, or drawback from warehouse, for consumption" (S. Rept. 999, supra).

In contrast to section 1313, 19 U.S.C. 1557(a) provides, in a general sense, for drawback, under certain conditions, on imported merchandise which has "remained continuously in bonded warehouse or otherwise in the custody and under the control of customs officers."

Imported merchandise entered for warehouse, and in the custody and under the control of Customs, does not, therefore, fall within the scope of section 1313, including, specifically, the provisions for same condition drawback under subsection (j).

Parenthetically, even if same condition drawback were applicable herein, the necessity that the claimant have "possession" of the substituted merchandise under section 1313(j)(3) would not be met while the merchandise remains in the warehouse subject to the control of the Government. In a recent ruling to be published in the Customs Bulletin (file DRA–1–09–CO:R:DC:D 218100, dated August 16, 1985), it is held that possession under section 1313(j)(3) "means *complete* control over the articles or merchandise on premises or locations where the possessor can put the articles or merchandise to any use chosen" (emphasis added).

Holding: Imported merchandise entered for warehouse is not eligible for drawback under the substitution provision of the same condition drawback law, 19 U.S.C. 1313(j)(3), if it is thereafter withdrawn from warehouse and exported.

(C.S.D. 86–9)

This ruling holds that 15 U.S.C. 70b(i) (Textile Fiber Products Information Act), does not grant authority to U.S. Customs officers to seize or otherwise detain shipments of mail order catalogues or promotional materials for textile fiber products which fail to meet fair advertising standards as set forth in this law.

October 24, 1985
RES-3 CO:R:E:E
728062 SO

MR. PHILIP METZGER,
Assistant Area Director, Commercial Operations, New York Seaport, U.S. Customs Service, 6 World Trade Center, Room 423, New York, New York 10048

DEAR MR. METZGER: In your memo of November 28, 1984, you asked for advice regarding the responsibility, if any, imposed on Customs officers by a recent amendment to Section 4 of the Textile Fiber Products Identification Act (15 U.S.C. 70b). Pursuant to this amendment, textile fiber product advertising in any mail order catalog or in mail order promotional material shall be considered to be false or deceptive, unless the product description clearly states that the textile fiber product is processed or manufactured in the United States, or imported, or both. Particularly, you asked if Customs officers would be responsible for examining imported mail order catalogs and promotional material to determine if there are any textile fiber products advertised therein which are falsely described. You also asked if any action should be taken against shipments of such printed matter found to contain false or deceptive advertising, as now defined.

We are of the opinion that the amendment to Section 4 of the Textile Fiber Products Identification Act referred to above does not impose a legal obligation on Customs officers to review shipments of mail order catalogs or promotional material specifically to discover violations of this type. The law (15 U.S.C. 70b(i)), in our opinion, does not grant authority to Customs officers to seize or otherwise detain shipments of mail order catalogs or promotional material which fail to meet the standards of fair advertising set forth in the law. If, however, a violation is discovered by a Customs officer in the normal course of his/her duties, it would be prudent to warn the importer that penalties may be assessed by the Federal Trade Commission if the catalogs are distributed with the "false advertising" in place.

(C.S.D. 86-10)

This ruling holds that a certain woman's woven fabric dress and an accompanying substantial fabric tie-belt are separately classifiable in accordance with Headnote 3, Part 6, Schedule 3, Tariff Schedules of the United States.

February 12, 1986
CLA-2:CO:R:CV:G
077496 PR

This ruling concerns the tariff status of a certain dress.

Facts: The submitted sample is a woman's blue dress, stated to be a product of China, made from a woven fabric that is labelled to be 55 percent cotton and 45 percent man-made fibers. It has a stand collar; and 8-snap front opening that extends from the neckline to the elasticized waist; front and rear yokes that taper downward in a V-fashion and which are edged with burgundy-colored piping, the visible portion of which is less than ¼ inch wide; less than elbow-length sleeves with two-button cuffs, and similar burgundy-colored piping inserted in the cuff seam; two belt thread loops, one at each side seam; two inserted pockets, one at each side seam just below the waist; and a large box-pleat in front that extends from the elasticized waist to the hem. The fabric from the body of the garment is slightly gathered where it meets the yokes, imparting a shirred effect.

Accompanying the dress is a tie-belt that consists of three sections. The two outer or tie portions are burgundy woven fabric strips, each approximately ⅜ inch wide and 29 inches long. The center portion, which is burgundy on one side and blue on the other, is approximately 25 inches long and 2½ inches wide; the corners are rounded; and the burgundy side has four decorative-appearing, but otherwise nonfunctional, tucks that extend its length.

We assume both the dress and the tie-belt are in chief value of cotton.

Issue: Two principal issues are presented by the subject garment and belt—(1) is either ornamented for tariff purposes; and (2) are the belt and dress classifiable as a single entity or are they separately classifiable?

Law and analysis: Headnote 3, Schedule 3, Tariff Schedules of the United States Annotated (TSUSA), lists the type of features that constitute ornamentation. One of the features listed is tucking. Therefore, the belt is ornamented with the four rows of decorative nonfunctional tucking. The dress is not ornamented for tariff purposes since neither the gathered appearance at the yoke seams nor the expandable box pleat are mentioned in Headnote 3. Furthermore, Customs has consistently held that, because of the existence of a practice, piping, the visible portion of which is less than ¼ inch in width, inserted in the entire length of a seam, does not constitute ornamentation.

The Customs Service, in the past, has stated that there existed an established and uniform practice to classify fabric coordinated belts as entireties with the garments they accompanied, submerging the identity of those belts into the garments. However, subsequent to the practice finding and issuance of a number of rulings following the practice, Congress enacted Headnote 3 to Part 6, Schedule 3, TSUSA, which provides as follows:

> (a) Except as provided in (b) of this headnote, each garment is to be separately classified under the appropriate tariff item,

even if two or more garments are imported together and designed to be sold together at retail.

(b) The provisions of paragraph (a) of this headnote shall not apply to—

(i) suits,

(ii) pajamas and other nightwear,

(iii) playsuits, washsuits, and similar apparel,

(iv) judo, karate, and other oriental martial arts uniforms,

(v) swimwear, and

(vi) infant's sets designed for children who are not over 2 years of age.

In a ruling dated November 6, 1985, file 077013, Customs held that the comparatively recent enactment by Congress of Headnote 3, Part 6, Schedule 3, TSUSA, had, in effect, nullified past rulings and practices which were in conflict with that headnote. That ruling also interpreted Headnote 3 and concluded that the words "garment" and "garments" were intended to include accessories, such as neckwear, belts, and scarfs.

We have contracted the drafters of Headnote 3, who confirmed that Headnote 3 was intended to eliminate the entireties rule as it was being applied to belts and neckwear, in particular. However, it was not intended that all belt-like articles fall within the purview of the headnote. Only substantial belts or belt-like articles are meant to be affected by the application of Headnote 3. In this regard, we conclude that, generally, all belts with nontextile attachments for closures are substantial. Tie-type belts that are no more than mere string ties made from the same fabric as their accompanying garments are not substantial and are considered to be part of those garments. In this instance, the tie-belt accompanying the subject dress is a substantial belt and is, therefore, separately classifiable from the dress.

Holding: In accordance with the principles expressed above, the subject dress is classifiable under the provision for other women's dresses, of cotton, not ornamented and not knit, in item 384.4925, TSUSA, with duty at the 1986 rate of 12.8 percent ad valorem. This garment falls within textile and apparel category 336. The subject tie-belt is classifiable under the provision for other women's ornamented cotton apparel, not knit, in item 384.0996, TSUSA, with duty at the rate of 20 percent ad valorem. The applicable textile and apparel category designation is 359.

However, since we understand that most textile belts imported with articles of apparel are not invoiced separately and do not, when subject to visa, import license, or quota restriction requirements, have the necessary accompanying documentation, an importer of such merchandise may, for merchandise entered, or withdrawn from warehouse, for a period of ninety (90) days from the date of the publication of this ruling in the Customs Bulletin, continue to enter such merchandise as entireties, under one textile

and apparel category. Upon the expiration of that ninety (90) day period, all merchandise subject to this ruling will be classified in accordance with the principles set out above.

U.S. Customs Service

General Notice

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Draft notice; *The Aviation Groups, Inc.* v. *United States,* Slip Op. 85–82, Court No. 82–2–00248.

The United States Court of International Trade, by order dated November 13, 1985, vacated its opinion and order in Slip Op. 85–82, dated August 7, 1985, and dismissed said case. The order of vacation and dismissal has not been published, and the purpose of this notice is to advise all interested parties that the state of the law, with regard to item 800.00, Tariff Schedules of the United States, (19 U.S.C. 1202), and used aircraft, remains as it was prior to August 7, 1985.

HARVEY B. FOX,
Director,
Classification and Value Division.

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 141 and 171

Proposed Customs Regulations Amendments Relating to Liens

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: The Tariff Act of 1930 authorizes Customs officers to refuse to permit delivery of certain merchandise when notified in writing of the existence of a lien for freight, charges or contribution in general average until proof has been produced that the lien has been satisfied or discharged. The Trade and Traiff Act of 1984 amended the Tariff Act of 1930 to allow licensed customs brokers to file a lien for freight, charges or contribution in general average to the same extent that a carrier may file such a lien. This document proposes to amend the Customs Regulations to implement the statutory provisions.

DATES: Comments must be received on or before April 28, 1986.

ADDRESS: Comments (preferably in triplicate) may be submitted to and inspected at the Regulations Control Branch, Room 2426, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Jerry Laderberg, Entry, Licensing, and Restricted Merchandise Branch, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229; 202-566-5765.

SUPPLEMENTARY INFORMATION:

Background

Section 564, Tariff Act of 1930, as amended (19 U.S.C. 1564), provides that whenever a Customs officer is notified in writing of the existence of a lien for freight, charges, or contribution in general average upon any imported merchandise sent to the appraiser's store for examination, entered for warehouse or taken possession of by him, he will refuse to permit delivery thereof from the public

store or bonded warehouse until proof is produced that the lien has been satisfied or discharged.

For purposes of § 564, § 141.112(a)(1), Customs Regulations (19 CFR 141.112(a)(1)), defines "freight" to mean the carrier's charge for the transportation of the goods from the place of shipment in the foreign country to the final destination in the U.S. "Charges" are defined in § 141.112(a)(2), Customs Regulations (19 CFR 141.112(a)(2)), to mean the charges due to or assumed by the claimant of the lien which are incident to the shipment and forwarding of the goods to the destination in the U.S., but does not include the purchase price, whether advanced or to be collected, nor other claims not connected with the transportation of the goods. Section 141.112(a)(3), Customs Regulations (19 CFR 141.112(a)(3)), defines "general average" as the liability to contribution of the owners of a cargo which arises when a sacrifice of a part of the cargo has been made for the preservation of the residue or when money is expended to preserve the whole. A lien for contribution in general average only arises from actions impelled by necessity.

A customs broker is a person licensed by Customs under the provisions of § 641, Tariff Act of 1930, as amended (19 U.S.C. 1641) and Part 111, Customs Regulations (19 CFR Part 111), to transact Customs business on behalf of importers and other persons. Section 212(b)(7), Trade and Tariff Act of 1984, Pub. L. 98–573, amended § 564 by adding a sentence to that provision which states that the section will apply to licensed customs brokers who otherwise possess a lien for the purposes stated in § 564 upon merchandise under the statutes or common law, or by order of any court of competent jurisdiction, of any state. By virtue of this provision Congress has authorized customs brokers possessing a lien for freight, charges or contribution in general average upon merchandise held by Customs to file that lien with the proper Customs officer so that the merchandise will not be released from Customs until the lien is satisfied or discharged.

Prior to the passage of the Trade and Tariff Act, § 564 had been limited to liens filed by carriers or their agents. By amending § 564, Congress specifically provided that brokers may file liens with Customs for the purposes stated in the law. Because brokers now stand in the same position as carriers with respect to filing liens, it is proposed to add a definition of the word "claimant" to § 141.112(a). It is proposed to define "claimant" in a new § 141.112(a)(4) as a carrier, customs broker or the successors or assigns of either. In addition, it is proposed to amend § 141.112(a)(1), which defines "freight", by removing the reference to the "carrier's charge" and substituting, in its place, the word "charges" without any reference to whose charges they might be. It is further proposed to amend § 141.112(b), relating to notice of lien, and § 141.112(d), relating to merchandise entered for immediate transportation, to remove the reference to the carrier signing the notice

of lien and filing the notice of lien and substitute a reference to the claimant.

Finally, it is proposed to correct certain clerical errors in § 171.44, Customs Regulations (19 CFR 171.44), relating to satisfaction of liens on forfeited property authorized for official use. Section 171.44 refers to the "satisfaction of liens for freight charges and contributions in general average." It is proposed to place a comma between the words "freight" and "charges" to reflect the statutory language and eliminate any confusion or limitation on the type of charges covered. It is further proposed to remove the "s" from the word "contributions."

COMMENTS

Before adopting this proposal, consideration will be given to any written comments (preferably in triplicate) that are submitted timely to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as defined in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 605(b)), it is certified that, if adopted, the proposed regulation will not have a significant economic impact on a substantial number of small entities. Accordingly, the proposed regulation is not subject to the regulatory analysis requirement of 5 U.S.C. 603 and 604.

DRAFTING INFORMATION

The principal author of this document was John E. Elkins, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PARTS 141 AND 171

Brokers, Customs duties and inspection, Imports, Liens.

PROPOSED AMENDMENTS TO THE REGULATIONS

It is proposed to amend Parts 141 and 171, Customs Regulations (19 CFR Parts 141, 171), as set forth below.

PROPOSED AMENDMENTS

PART 141—ENTRY OF MERCHANDISE

1. It is proposed that the general authority citation for Part 141 continue to read as set forth below:

AUTHORITY: 19 U.S.C. 66, 1448, 1484, 1624.

2. It is proposed to amend § 141.112(a)(1) by removing the words "carrier's charge" and inserting, in their place, the word "charges".

3. It is proposed to further amend § 141.112(a) by adding a new paragraph (4) to read as follows:

§ 141.112 Liens for freight, charges, or contribution in general average.

(a) * * *

(4) *Claimant.* "Claimant" means a carrier, customs broker or the successors or assigns of either.

4. It is proposed to amend §§ 141.112 (b) and (d) by removing the word "carrier" and, in each instance, inserting, in its place, the word "claimant".

PART 171—FINES, PENALTIES, AND FORFEITURES

1. It is proposed that the general authority citation for Part 171 continue to read as set forth below:

AUTHORITY: 19 U.S.C. 66, 1592, 1618, 1624.

2. It is proposed to amend § 171.44 by placing a comma after the word "freight" in the second sentence of the paragraph and by removing the letter "s" from the word "contributions".

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: February 3, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, February 25, 1986 (51 FR 6555)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
Morgan Ford
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.

Senior Judges

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

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Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86–14)

BINGHAM & TAYLOR, DIVISION VIRGINIA INDUSTRIES, INC., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 85–07–00909

Before CARMAN, *Judge.*

MEMORANDUM OPINION

[Appeal from International Trade Commission's preliminary negative injury determination remanded.]

(Decided February 14, 1986)

Collier, Shannon, Rill & Scott (*Paul C. Rosenthal and Kathleen T. Weaver*) for the plaintiffs.

Lyn M. Schlitt, General Counsel, *Michael P. Mabile,* Assistant General Counsel, and *John C. Kingery,* United States International Trade Commission, for the defendant.

CARMAN, *Judge:* In this countervailing duty action plaintiffs contest the preliminary determination of the United States International Trade Commission (Commission) that there is no reasonable indication the domestic light iron construction castings industry is materially injured or threatened with material injury by reason of subsidized imports from Brazil. *Iron Construction Castings from Brazil, Canada, India, and the People's Republic of China,* 50 Fed. Reg. 27,498 (1985). Defendant opposes plaintiffs' Rule 56.1 motion for judgment upon the agency record, contending that the Commission's preliminary determination is not arbitrary, capricious, nor an abuse of discretion, and is in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(A) (1982) (standard of review). For the reasons that follow, the Court remands this action to the Commission for redetermination.

BACKGROUND

This controversy arises out of five simultaneously initiated investigations involving iron construction castings. Four of the investigations are antidumping investigations in which the Commission

found that there is a reasonable indication that the domestic industry is materially injured or threatened with material injury by reason of sales at less than fair value of light and heavy construction castings imported from Brazil, Canada, India and the People's Republic of China. Plaintiffs in this case challenge the Commission's preliminary determination in the fifth investigation, which is a countervailing duty investigation of iron construction castings from Brazil. The Commission's determination in the countervailing duty investigation, published in the same notice as the determinations for the antidumping investigations, was that a domestic industry is materially injured by Brazilian imports of heavy iron construction castings, while there is no reasonable indication that a domestic industry is materially injured or threatened with material injury, or that the establishment of an industry in the United States is materially retarded, by reason of Brazilian light iron construction castings. *See* 50 Fed. Reg. 27,498.

In reaching its preliminary affirmative injury determinations in the antidumping investigations, the Commission cumulated the impact of the imports from the four countries on the domestic industry. In reaching the preliminary determination in the countervailing duty investigation, however, the Commission refused to cumulate the impact of imports subject to the antidumping investigations with the impact of imports subject to the Brazilian countervailing duty investigation. *See Iron Construction Castings from Brazil, Canada, India, and the People's Republic of China,* U.S.I.T.C. Public. 1720, at 12, Investigation No. 701-TA-249 (Preliminary) (June 1985).

OPINION

The primary issue is whether section 612(a)(2) of the Trade and Tariff Act of 1984 (the 1984 Act), Pub. L. No. 98-573, 98 Stat. 3033 (to be codified at 19 U.S.C. § 1677(7)(C)(iv)), requires the Commission to cumulatively assess the volume and effect of imports of like products subject to both antidumping and countervailing duty investigations. Section 612(a)(2) of the 1984 Act amended section 771(7)(C) of the Tariff Act of 1930 by adding *inter alia* the following:

> (iv) Cumulation.—For purposes of clauses (i) [volume] and (ii) [price], the Commission shall cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation if such imports compete with each other and with like products of the domestic industry in the United States market.

19 U.S.C.A. § 1677(7)(C)(iv) (West Supp. 1985).

Plaintiffs contend that the subsection (iv) cumulation provision quite broadly "requires the Commission to cumulate when two criteria are satisfied: (1) Imports of like products are subject to inves-

tigation, and (2) imports compete with one another and with the domestic like product." Plaintiffs' Brief at 13. Plaintiffs' position is that there is no additional requirement that the cumulated imports be subject to the same type of investigation and, therefore, subsection (iv) requires the "cross-cumulation" of the volume and effect of imports subject to both antidumping and countervailing duty investigations.[1]

Defendant contends that as the 1984 Act provision for cumulation is entirely silent concerning cross-cumulation, initial statutory directives imposing countervailing and antidumping duties continue to control.[2] In countervailing duty cases, for instance, defendant claims that 19 U.S.C. § 1671(a) applies, which reads:

> (a) General Rule.—If—
> (1) the administering authority determines that—
> (A) a country under the Agreement, or
> (B) a person who is a citizen or national of such a country, or a corporation, association, or other organization organized in such a country, is providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of a class or kind of merchandise imported into the United States, and
> (2) the Commission determines that—
> (A) an industry in the United States—
> (i) is materially injured, or
> (ii) is threatened with material injury, or
> (B) the establishment of an industry in the United States is materially retarded,
> *by reason of imports of that merchandise,*
>
> then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net subsidy.

19 U.S.C. § 1671(a) (1982) (emphasis added). Essentially, defendant's argument is that section 1671(a) restricts the Commission's injury investigation in countervailing duty cases to the injury "by reason of imports of that merchandise" investigated with respect to the provision of a subsidy. By the same reasoning, defendant argues that in antidumping duty investigations 19 U.S.C. § 1673 restricts the Commission's injury investigation to the injury "by reason of that merchandise" investigated with respect to sales in the United States at less than fair value.

The Court finds that section 1677(7)(C)(iv), without exception, requires the cumulation of imports from two or more countries of like products "subject to investigation" that compete with one an-

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[1] The term "cross-cumulation" as used in this opinion refers to the aggregation of less than fair value (dumped) and subsidized imports from two or more countries for purposes of volume and price analysis.

[2] The Commission cited the respective provisions for *final* determinations, 19 U.S.C. §§ 1671d (countervailing duty investigations) and 1673d (antidumping duty investigations), as its basis for refusing to cross-cumulate. *See* U.S.I.T.C. Public. 1720, at 12-13. Defendant in its briefs focused on 19 U.S.C. §§ 1671(a) and 1673, though, apparently because this action is a challenge to a *preliminary* determination.

other and with the domestic like product, regardless of whether the investigations relate to dumping, subsidies, or both.

Although an agency's interpretation of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with congressional intent, *see Asahi Chemical Industry Co.* v. *United States,* 4 CIT 120, 123–25, 548 F. Supp. 1261, 1264–65 (1982), the court will not defer to an interpretation that is contrary to the express language of the statute, its purpose, and congressional intent. *See Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.,* No. 84–1274, slip. op. at 6 (U.S. Jan. 22, 1986); *Rose* v. *Lundy,* 455 U.S. 509, 517 (1982); *Southeastern Community College* v. *Davis,* 442 U.S. 397, 411 (1979). The Court is constrained to conclude in the instant case that the Commission's refusal to cumulate is indeed contrary to the statute, its purpose, and legislative intent.

The legislative history of the 1984 Act does not explicitly address the issue of cross-cumulation. The House Ways and Means Committee, however, provided the following explication of the new cumulation provision:

> *Reasons for change*
>
> The purpose of mandating cumulation under appropriate circumstances is to eliminate inconsistencies in Commission practice and to ensure that the injury test adequately addresses simultaneous unfair imports from different countries. Most Commissioners have applied cumulation under certain circumstances but have articulated a variety of differing criteria and conditions. However, cumulation is not required by statute. In addition, a few Commissioners have imposed conditions which do not seem justified to the Committee.
>
> The Committee believes that the practice of cumulation is based on the sound principle of preventing material injury which comes about *by virtue of several simultaneous unfair acts or practices.* The Committee amended the criteria to permit cumulation of imports from various countries that each account individually for a very small percentage of total market penetration, but when combined may cause material injury. The requirement in the bill as introduced that imports from each country have a "contributing effect" in causing material injury would have precluded cumulation in cases where the impact of imports from each source treated individually is minimal but the combined impact is injurious. The Committee does intend, however, that the marketing of imports that are cumulated be reasonably coincident. Of course, imports of like products from countries not subject to investigation would not be included in the cumulation.

H.R. Rep. No. 725, 98th Cong., 2d Sess. 37, *reprinted in* 1984 U.S. Code Cong. & Admin. News 5127, 5164 (emphasis added).

In keeping with the foregoing views, Congress broadly required cumulation of the injurious effects of "simultaneous unfair acts or

practices" if certain conditions are met. Congress's rejection of the concept of "contributing effect" underscores its intent that cumulation be broadly applied, even where the impact of unfairly traded imports from one source may be minimal, "but the combined impact is injurious." There is no doubt that the combined impact from both dumped and subsidized imports may be injurious. Further, there is no suggestion in the language of the 1984 statute or in its legislative history that the Commission separately consider the injurious effects of one type of unfair practice from those of another type of unfair practice.[3] The effects of injury from different types of unfair trade practices upon the domestic industry are identical—it makes no difference to a domestic light construction castings producer whether it loses sales because foreign castings are dumped or because they are subsidized. As the Commission's own General Counsel correctly observed, "[t]he rationale for aggregating import data rests upon the combined effects of unfairly traded imports in contributing to injury to the domestic industry involved. The considerations are not different in countervailing duty investigations than they are in antidumping investigations." Memorandum from General Counsel to the Commission, GC–G–05, at 12–13 (Jan. 7, 1983) (quoting GC–F–186).

It is further noteworthy that when Congress considered the amendment of section 1677(7)(C) it was apprised of the question of cumulating imports of the same product in separate countervailing duty and antidumping duty investigations:

> The law now permits the International Trade Commission to combine or "cumulate" imports from different countries when making injury determinations in antidumping and countervailing duty investigations. Cumulation makes sense; death by one or one hundred blows is equally fatal. The ITC, however, has been hesitant to cumulate imports at all and extremely reluctant to do so in preliminary injury investigations. *There also has been some question about cumulation of imports of the same product in separate countervailing duty and antidumping cases.* We believe that it would be helpful to amend the statute to require cumulation in certain circumstances. Such an amendment would help to ensure that domestic industries are not denied relief because of an unwise exercise of discretion by the Commission.

Options to Improve the Trade Remedy Laws: Hearings Before the Subcomm. on Trade of the Comm. on Ways and Means, 98th Cong., 1st Sess. 197, 203 (1983) (statement of Adolph J. Lena) (emphasis added). Significantly, Congress did not make any exclusion or ex-

[3] The legislative history of the Trade Agreements Act of 1979 also emphasizes congressional focus on the impact to domestic industries from unfair trade practices. There too Congress viewed subsidies and dumping as "two of the most pernicious practices which distort international trade to the disadvantage of United States commerce." S. Rep. No. 249, 96th Cong., 1st Sess. 37, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 423.

ception for cross-cumulation in the 1984 statute, but rather elected to mandate cumulation in broad terms.[4]

Defendant points out, however, that Congress intended the Trade Agreements Act of 1979 to implement two important, but separate, multilateral agreements—the Subsidies and the Antidumping Codes, that is, the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade. *See* S. Rep. No. 249, at 37. Moreover, Congress added material injury requirements respectively to the countervailing duty and antidumping duty statutes. Defendant thus contends that the enactment of United States obligations under the separate Codes with separate injury tests bars the cross-cumulation of injury from imports subject to separate countervailing duty and antidumping duty investigations. Defendant appears especially impressed that the injury test in subsidy cases applies only to countries that have signed the Subsidies Code, while all importers receive the benefit of an injury determination in antidumping investigations. *Compare* 19 U.S.C. §§ 1303 and 1671(b) (imposition of countervailing duties) *with* 19 U.S.C. § 1673 (imposition of antidumping duties); *see also* S. Rep. No. 249, at 61.

Nevertheless, the definition of material injury, the respective indicia of injurious impact, and the causal nexus between the injury and the unfairly traded imports are identical for subsidy and dumping investigations and are outlined in a common statutory provision—19 U.S.C. § 1677(7). The 1984 Act added to this statute subsection (C)(iv), which broadly states that "the Commission shall cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation if such imports compete with each other and with like products of the domestic industry."

While mere placement of the cumulation directive in a statutory provision applicable to both antidumping and countervailing duty cases does not in and of itself suggest or require aggregation of dumped and subsidized imports, the language of subsection (C)(iv)

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[4] Prior to the 1984 Act, the Commission had found the cumulation methodology appropriate in certain investigations under the Antidumping Act of 1921 and the Trade Agreements Act of 1979. *See, e.g., Portland Gray Cement from Portugal*, T.C. Public. 37, Investigation. No. AA1921-22, (1961); *Pig Iron from East Germany, Czechoslovakia, Romania, and the U.S.S.R.*, T.C. Public. 265, Investigation Nos. AA1921-52-55, (1968); *Aminoacetic Acid (Glycine) from France*, T.C. Public. 313, Investigation Nos. AA1921-61, (1970); *Certain Carbon Steel Products from Belgium, The Federal Republic of Germany, France, Italy, Luxembourg, The Netherlands, and The United Kingdom*, U.S.I.T.C. Public. 1064, Investigation Nos. 731-TA-18-24 (Preliminary) (1980). The Commission had not, however, *cross-cumulated* prior to the 1984 Act. U.S.I.T.C. Public. 1720, at 12.

Cumulation was first judicially approved in *City Lumber Co.* v. *United States*, 64 Cust. Ct. 826, A.R.D. 269, 311 F. Supp. 340 (1970), *aff'd*, 59 CCPA 89, C.A.D. 1045, 457 F.2d 991 (1972). Still, Congress explicitly recognized in 1974 that cumulation was not required "as a matter of law," but could be applied by the Commission on a case by case basis. S. Rep. No. 1298, 93d Cong., 2d Sess. 180 (1974). It was only after a long period of administrative discretion in applying cumulation that Congress finally made the methodology mandatory in the 1984 Act.

For a rendition of the legislative process leading to the enactment of section 1677(7)(C)(iv) and the refusal of the House conferees to yield on the stringent cumulation requirement, as they had done in agreeing to agency discretion respecting other provisions, see Bello & Holmer, *The Trade and Tariff Act of 1984: Principal Antidumping and Countervailing Duty Provisions*, 19 Int'l Law. 639, 661 & nn. 74-78 (1985).

requires the cumulation of products "subject to investigation." There is absolutely no indication that cumulation is to be limited to products subject only to antidumping duty investigations or to products subject only to countervailing duty investigations. Again, "[t]he primary concern of the law is with the effect on domestic industry." *American Grape Growers Alliance for Fair Trade* v. *United States,* 9 CIT——, 615 F. Supp. 603, 606, *appeal docketed,* No. 85–2717 (Fed. Cir. Aug. 28, 1985) (cumulation required where like products compete with each other only to the same degree as with like products of domestic industry under pre-1984 Act law). In light of Congress's expressed concern with the combined effects of all unfairly traded imports upon domestic industries, the Court must inexorably conclude that section 1677(7)(C)(iv) is intended to require the cumulation of all competing like products subject to investigation, whether the investigations cover dumped or subsidized imports, or both.

The Court is mindful of the policy of encouraging countries to sign the Subsidies Code, *see* S. Rep. No. 249, at 44–45, which underlays the requirement of an injury determination in subsidy investigations. Although countries "under the Agreement" providing subsidies leading to only *de minimis* injury may be penalized because of dumped merchandise over which they have no control, the concern is no different in multiple subsidy investigations where each country has no control over subsidization by other countries, and where cumulation is concededly mandatory. In enacting countervailing and antidumping duty laws, Congress balanced many interests. But with the 1984 cumulation provision, Congress clearly tipped the scale in favor of the domestic industry and against any country engaging in unfair trade practices.

Defendant contends that the application of cross-cumulation would lead to anomalous results, referring to various distinctions between the antidumping and countervailing duty provisions respecting certain special findings and considerations in injury investigations. *Compare* 19 U.S.C. § 1671d(b)(4) *with* 19 U.S.C. § 1673d(b)4 (additional findings required upon an affirmative finding of critical circumstances); *see also* 19 U.S.C. § 1677(7) (E) and (F)(i) (consideration of nature of subsidy in determination of threat of material injury). Cumulation, however, is required only for the purpose of evaluating volume and price effects under 19 U.S.C. § 1677(7)(C) (i) and (ii). Plainly, cross-cumulation does not preclude the Commission from properly making certain findings or considering information as required by these other statutory provisions.

Defendant's argument, based on a literal reading of statutory provisions *other* than the cumulation provision (i.e., 19 U.S.C. §§ 1671(a), 1671d(b), 1673 and 1673d(b)), stems from a perceived requirement of a causal nexus between dumped or subsidized imports, not a combination of both, and the injury to the domestic in-

dustry.[5] A literal reading of these provisions, however, would equally prohibit the cumulation of imports subject to two or more investigations of the same unfair trade practice. If 19 U.S.C. §§ 1671d(b) and 1673d(b), for example, were read to mean that the Commission's final determination must be of injury "by reason of imports of the merchandise" found by the International Trade Administration to be subsidized (or dumped), it would follow that cumulation of the injurious effects of imports covered by separate investigations would always be prohibited because the Commission must limit its causal nexus analysis to the merchandise which is subject to the particular dumping or subsidy investigation. To the extent that the other statutory provisions cited by defendant are *in pari materia* with the cumulation provision, they must be harmonized with the clear congressional purpose in broadly mandating cumulation. *See United States* v. *Invicta Seeland, Inc.*, 25 CCPA 300, 305–06, T.D. 49397 (1938).

Defendant has not pointed to one policy reason why the cumulative injurious effects of imports in multiple subsidy investigations or multiple dumping investigations should be treated differently from the cumulative injurious effects of imports in concurrent subsidy and dumping investigations. Defendant's interpretation of the law in essence urges this Court to tolerate an obvious loophole in the cumulation directive for no apparent justification. As discussed, congressional intent to protect domestic industry from the compounded effects of unfairly traded imports from two or more countries requires no more than that the injury be caused by imports of competing like products from countries under investigation.[6]

The criteria that the Commission is required to consider in subsections (C) (i) and (ii) applies to both preliminary and final determinations. *See* 19 U.S.C. § 1677(7)(B). The Court accordingly holds that the Commission's refusal in its preliminary determination to cumulate the volume and effect of imports of the merchandise subject to both the countervailing and antidumping duty investigations is not in accordance with law. This case must therefore be remanded to the International Trade Commission for further consideration and redetermination consistent with this opinion.

Plaintiffs also challenge the Commission's interpretation and application of the "reasonable indication" standard of 19 U.S.C. § 1673(b)(a) (1982) in making its preliminary determination, citing *American Lamb Co.* v. *United States*, 9 CIT ——, 611 F. Supp. 979,

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[5] The extent of the relevant cause of injury is itself a highly controversial issue and not settled in the law. *See generally*, Victor, *Injury Determinations by the International Trade Commission in Antidumping and CVD Proceedings* in the Trade Agreements Act of 1979—Four Years Later 117, 147–54 (1983).

[6] An additional requirement for cumulation, clear from the legislative history, is that the marketing of unfairly traded imports be "reasonably coincident." H.R. Rept. No. 725, at 37; *see also* Price, *The Trade and Tariff Act of 1984: An Analytical Overview*, 19 Int'l Law. 321, 335 (1985) (predicating cumulation on three conditions); *cf. Certain Carbon Steel Products from Austria, Poland, Romania, Sweden and Venezuela*, U.S.I.T.C. Public. 1642, at 48–50, Investigation Nos. 701-TA-225-234 and 731-TA-213-217, 219, 221-26, and 228-35 (Preliminary) (1985) (views of Vice Chairman Liebeler) (cumulation limited to imports from countries that are *currently* the subject of an investigation). This issue is not before the Court in the present case since the countervailing duty investigation exactly paralleled the antidumping investigations.

appeal docketed, No. 86-560 (Fed. Cir. Oct. 21, 1985); *Jeannete Sheet Glass Corp.* v. *United States,* 9 CIT ——, 607 F. Supp. 123, *appeal docketed,* No. 86-519 (Fed. Cir. October 4, 1985); *Republic Steel Corp.* v. *United States,* 8 CIT 29, 591 F. Supp. 640 (1984), *reh'g* denied, 9 CIT ——, Slip. Op. 85-27 (March 11, 1985). As it may ultimately be unnecessary to reach the issue of "reasonable indication" in this case, the Court reserves decision on this question at this time.

(Slip Op. 86-15)

ARMSTRONG RUBBER CO., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 84-10-01444

Before WATSON, *Judge.*

MEMORANDUM AND ORDER

[Motion for an order of contempt denied.]

(Decided February 14, 1986)

Frederick L. Ikenson for the plaintiffs.
Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, (*J. Kevin Horgan,* Attorney) for defendant.

WATSON, *Judge:* Plaintiffs have moved the court to hold certain officials of the Commerce Department in contempt of court for refusing to resume an investigation of whether or not radial ply tires from the Republic of Korea were being sold here at less than fair value.

This refusal followed a judgment in which the court reversed a determination by the International Trade Commission (ITC), which determination had the effect of terminating the administrative investigation of those tires.

The ITC had determined that there was no reasonable indication of injury from imports of tires from the Republic of Korea. This court found that the ITC had applied an erroneous legal standard and remanded the matter for the issuance of a determination in accordance with the court decision. *Armstrong Rubber Co., et al.* v. *United States,* 9 CIT —— Slip Op. 85-85 (August 8, 1985).

In a later opinion in the same case the court denied defendants' motion for a stay pending appeal. (Slip Op. 85-109, October 18, 1985)

On these facts, the court will not exercise its contempt power against officials of the Department of Commerce. Although it was within the contemplation of the court that the judgment it was issuing would lead to the resumption of the investigation by the Department of Commerce, the court did not say so specifically. While

it is true that the opinion denying the motion for a stay speaks of the strong public interest in the "uninterrupted progress of these investigations" it did not direct the continuation explicity.

It is also true that the opinion denying the stay refers to the opinion in *American Grape Growers Alliance, et al.* v. *United States,* 9 CIT ——, (Slip Op. 85–104 October 7, 1985), in which the court's expectation that such judgments create the necessity of a resumption of the investigation by the Department of Commerce is even more pronounced.

Nevertheless, even though it may be said that the court expected its judgments with respect to erroneous ITC determinations (determinations which had the effect of terminating investigations) to lead inexorably to the continuation of the investigations by the Commerce Department, it did not include a direction to that effect in its judgment.

An excuse for inaction which would be a minor technicality in other areas in which courts are called upon to judge the consequences of action or inaction, must be given more importance in the area of contempt. It is a settled safeguard, as it should be, that the awesome power of contempt is not to be used unless the party said to be in contempt has been given a clear direction by the court. *International Longshoremen's Association* v. *Philadelphia Marine Trade Association,* 389 U.S. 64, 76 (1967). In fairness, it must be said that the judgment in this action did not give the Commerce Department a plain direction to resume the investigation.

Since making this motion for contempt, plaintiff has commenced a separate action to compel the Department of Commerce to resume the investigation. The substance of the dispute regarding the inaction of the Department of Commerce will be reached in the new action.

For the reasons given above, plaintiffs' motion to hold officials of the Department of Commerce in contempt of court is denied.

(Slip Op. 86–16)

PHILIPP BROTHERS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84–4–00528

OPINION

[Remanded.]

(Decided February 14, 1986)

Donohue and Donohue (*James A. Geraghty* and *Margaret R. Polito*) for plaintiff.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, *Elizabeth C. Seastrum,* (*Andrea E. Migdal* of Counsel), Civil Division, United States Department of Justice, for defendant.

RESTANI, *Judge:* This matter is before the court on plaintiff's challenge of the final determination in a section 751 annual review of a countervailing duty (CVD) order. Tariff Act of 1930, as amended, 19 U.S.C. § 1675 (1982 & West Supp. 1985); 49 Fed. Reg. 9,923 (1984). On April 4, 1980, the International Trade Administration (ITA) of the United States Department of Commerce published a CVD order, pursuant to 19 U.S.C. § 1303 (1982), on pig iron from Brazil.[1] 45 Fed. Reg. 23,045 (1980). The excessive remission of Brazil's value-added Industrial Products Tax (IPI) was among the subsidies found to be provided by the government of Brazil for exports of Brazilian pig iron. Prior to issuance of the CVD order by ITA, however, the Brazilian government announced that this excess credit would be eliminated as of December 12, 1979, and the subsidy determination was reduced accordingly. Consistent with the conclusion of the Treasury Department, ITA's estimated duties for the eight largest exporters were calculated on a company-specific, rather than average, basis reflecting the varying benefits received by each of the companies from the subsidies. In both its first and second annual reviews, however, ITA switched from its company-specific CVD assessment to an average assessment, which thereby required each pig iron exporter to pay countervailing duties at the same rate. In addition, in its second annual review, ITA announced that it had learned that although the Brazilian government had begun to impose a tax to offset the IPI export credit premium, collection of that tax had been delayed. ITA concluded that the delay in collection conferred a benefit akin to an interest free loan to Brazilian pig iron exporters. ITA calculated the *ad valorem* benefit of the delay in collection of the offset tax and increased the aggregate countervailing duty rate accordingly in its second annual review, covering entries made during 1980.

Only plaintiff's challenge of ITA's second annual review is before the court. Plaintiff alleges that the decision to assess countervailing duties on an average basis rather than a company-specific basis was unlawful. In addition, plaintiff asserts that ITA's second annual review was untimely and therefore contrary to law. Further, plaintiff claims that adjustment of the CVD rate due to the lag in collection of the IPI export credit premium offset tax constituted the imposition of a CVD without first establishing that such delay is in fact a subsidy. Finally, plaintiff contends that even if this delay in tax collection constitutes a subsidy, ITA's calculation of the IPI export credit subsidy based on credits earned rather than received, required it to similarly consider the date of offset tax assessment rather than collection.

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[1] The CVD investigation was initially conducted by the United States Department of Treasury as the administering authority under 19 U.S.C. § 1303, prior to enactment of the Trade Agreements Act of 1979. After issuance of the final affirmative determination by Treasury, the Trade Agreements Act of 1979 became effective and authority to issue CVD orders was transferred from Treasury to Commerce. Subsequent proceedings were governed by the transition rules of the Trade Agreements Act of 1979. Public L. No. 96-39, § 102, 93 Stat. 144.

I. *Participation in Comment Period as Jurisdictional Prerequisite*

Defendant raises the same jurisdictional defense, failure to exhaust administrative remedies, to plaintiff's first two claims. Specifically, defendant maintains that plaintiff was required to participate in the comment period following the issuance of the section 751 preliminary review before seeking judicial relief. Under section 751, as it read during the period in question, ITA was required to conduct annual reviews of each CVD order.[2] Accordingly, the agency published its notice of "Preliminary Results of Administrative Review" concerning Brazilian pig iron. 48 Fed. Reg. 54,091 (1983). This notice invited interested parties to comment on the preliminary results. *Id.* Written comments could be submitted within thirty days of the date of publication of the notice (November 30, 1983). Parties could also "request disclosure and/or a hearing" within ten days of publication. *Id.* at 54,093. The first question confronting the court is whether plaintiff was required to submit comments or request a hearing before raising issues in this court that could have been raised before the agency.

"The general rule is that 'administrative exhaustion of remedies is required before a litigant will be allowed to raise a claim via a civil action.' " *Allen* v. *Regan*, 9 CIT ——, Slip Op. 85–126 at 6 (Dec. 10, 1985) (quoting *Rhone Poulenc, S.A.* v. *United States*, 7 CIT 133, 583 F. Supp. 607, 609 (1984), citing *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)). Procedures governing section 751 reviews are set out in 19 C.F.R. § 355.41 (1983), promulgated by the Secretary of the Treasury. Section 355.41(d) specifically lists the various procedures that ITA set forth in its preliminary order. Thus, to have exhausted its administrative remedies, plaintiff should have either requested a hearing or offered written comments on the proposed changes. Under normal circumstances, only then would it be able to raise those issues at the judicial level. *L.A. Tucker Truck Lines*, 344 U.S. at 37 ("as a general rule * * * courts should not topple over administrative decisions unless the administrative body not only had erred, but has erred against objection made at the time appropriate under its practice"); *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143, 155 (1946) ("[a] reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore pre-

[2] 19 U.S.C. § 1675(a) reads as follows:

Administrative review of determinations

(a) Periodic review of amount of duty.—

(1) In general.—At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order * * * the administering authority, [if a request for such a review has been received and] after publication of notice of such review in the Federal Register, shall—

(A) review and determine the amount of any net subsidy,

(B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, and

(C) review the current status of, and compliance with, any agreement by reason of which an investigation was suspended, and review the amount of any net subsidy or margin of sales at less than fair value involved in the agreement,

and shall publish the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed in the Federal Register.

(Bracketed material was added by amendment in 1984.)

sented"); *Meglio* v. *Merit Systems Protection Board*, 758 F.2d 1576, 1577–78 (Fed. Cir. 1984) (failure to raise claim before administrative body constitutes effective waiver of right to contest).

A plaintiff's failure to exhaust its administrative remedies is not always fatal to its case, however. This court is not required by statute to consider full exhaustion of administrative remedies a jurisdictional prerequisite to an action contesting the final determination of an annual review of a countervailing duty order. Instead, in this situation, the court "shall, *where appropriate*, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d) (1982) (emphasis added). *See Rhone Poulenc*, 7 CIT at 136, 583 F. Supp. at 611 (exhaustion required "where appropriate" if plaintiff satisfies prerequisite of participation under 19 U.S.C. § 1516a(a)(2)).[3]

With regard to the average versus company-specific CVD rates issue, plaintiff contends that it should be excused from the requirement of raising the issue at the administrative level because the law, as interpreted by this court just after publication of the preliminary section 751 review, prohibited ITA from retroactively assessing countervailing duties. The day after the section 751 preliminary review was published, this court issued its decision in *Ambassador Division of Florsheim Shoe Co.* v. *United States*, 6 CIT 278, 577 F. Supp. 1016 (1983), *rev'd*, 748 F.2d 1560 (Fed. Cir. 1984). In *Florsheim*, this court interpreted section 751 and held that ITA could not, pursuant to a periodic review, suspend liquidation of entries and impose a retroactive assessment of countervailing duties. Plaintiff's position is that it was entitled to rely on the expectation that Commerce would act in accordance with this court's decision in *Florsheim*. Pursuant to *Florsheim* (prior to reversal), Commerce could not have switched from the lower company-specific rates to the higher average assessment because to do so would be the retroactive assessment of countervailing duties which was barred by *Florsheim*. Defendant contended at oral argument that although *Florsheim* was arguably favorable to plaintiff, the case did not specifically address the company-specific versus average issue and was, therefore, distinguishable from plaintiff's case. Plaintiff was, according to defendant, obliged to bring to ITA's attention the applicability of that decision to plaintiff's case and, presumably, to raise any additional objections to the assessment of CVDs on an average basis.

The court cannot agree with defendant's argument. It is true that *Florsheim* did not specifically address the company-specific versus average issue. The holding of that case, however, invalidating the suspension of liquidation and retroactive assessment of countervailing duties pursuant to a section 751 review, clearly would have controlled the case at bar had it not been reversed subsequently. Although the *Florsheim* decision was not final, in the

[3] There is no dispute that plaintiff "participated" in the proceedings below.

sense that time for appeal had not run, it was sufficiently final to constitute applicable precedent. *See Rhone Poulenc* 7 CIT at 137, 583 F. Supp. at 612 (an appealed decision remains valuable precedent until reversed). In the final results of the section 751 review in question, ITA did not deny the applicability of the lower court decision in *Florsheim.* Rather, ITA responded to a comment of the Brazilian government noting the applicability of *Florsheim* by stating, "[t]he Department [of Commerce] has appealed the *Florsheim* decision. The Department believes that its practice of retroactive collection [of CVDs] is correct and will continue to operate on that belief pending the outcome of the appeal." 49 Fed. Reg. at 9,924. Thus, this is a situation in which ITA refused to apply the clearly applicable precedent and not one in which a party failed to argue for adherence to possibly distinguishable case law.[4] Even in such a situation, plaintiff might have the burden of presenting alternative arguments to ITA prior to raising those arguments to this court, but further aggravating factors exist. Plaintiff's argument to this court challenging the legality of ITA's switch to a company-specific assessment of CVDs is based on facts available only in the confidential administrative record. The deadline for seeking access to the confidential administrative record had passed by the time plaintiff received notice of the deadline.[5] Nonetheless, absent the situation created by ITA's disregard of the lower court opinion in *Florsheim,* which plaintiff had no reason to anticipate, plaintiff would not be relieved of the obligation to seek additional time to obtain access to the confidential administrative record, which it needed to make presentation of alternative arguments possible. Separately, neither of these factors necessarily tips the scale against requiring exhaustion of administrative remedies, but the result is clear if they are weighed together. The court considers it inappropriate to require plaintiff, under the doctrine of exhaustion of administrative remedies, to argue to ITA for adherence to clearly applicable precedent, to anticipate disregard of the precedent and to then raise alternative arguments to the agency, the basis for which plaintiff could not know. Thus, plaintiff is not barred by a failure to exhaust its administrative remedies and its claim that ITA's switch to an assessment of CVDs on an average, rather than company-specific, basis is properly before this court. The court must, therefore, determine whether this decision of ITA in the sec-

[4] It should be noted that India, the country under investigation in *Florsheim,* was not a signatory to the GATT Subsidies Code while Brazil is an "agreement country." The procedures governing CVD determinations are more favorable to agreement countries, *see* 19 U.S.C. § 1671(a) (1982 & West Supp. 1985) (requiring material injury determination for agreement countries as prerequisite to imposition of CVDs), however, and thus it would not make sense to say that the lower court ruling in *Florsheim* was distinguishable on this basis.

[5] The "preliminary results" of the section 751 review were published in the federal register on November 30, 1983, 48 Fed. Reg. 54,091 (1985), and the deadline for requesting confidential information was stated therein to be just 5 days later, December 5, 1983. Generally, notice by publication in the federal register is appropriate for all purposes, *see, e.g.,* 19 C.F.R. § 355.28(a)(4) (1983), but here the section 751 annual review was already months late at the time these preliminary results were published. *See* 19 U.S.C. § 1675 (1982 & West Supp. 1985). Under these circumstances, ITA appropriately undertook to notify the parties directly. This notification was sent to plaintiff by letter dated December 6, 1983, by which time the December 5, 1983, deadline for requesting confidential information had already passed.

tion 751 review that is before this court is supported by substantial evidence on the record and is otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1982).

II. *Company-Specific Versus Average CVD Assessment*

As noted, although ITA calculated estimated CVDs on a company-specific basis in its CVD order, it then switched to an average assessment in the section 751 reviews. Plaintiff contends that ITA's failure to explain its departure from the company-specific deposit rates necessarily determines that ITA's decision was unlawful. Defendant responds that although ITA is required, in conducting preliminary and final countervailing duty determinations, to state any material differences in the benefits received by separate enterprises, 19 C.F.R. §§ 355.28(a)(3) and 355.33(f) (1983), no such requirement exists for section 751 reviews.[6] In addition, defendant claims that, even if company-specific assessments might be required in particular instances, the decision to use an average assessment in the case at bar was imminently reasonable because of the lack of material differences in the benefits received by various companies. Finally, defendant argues that to require company-specific assessments in section 751 reviews would impose an unfair burden on ITA.

To begin, the fact that 19 C.F.R. §§ 355.28(a)(3) and 355.33(f) may be inapplicable by their terms to the form of final published results of section 751 reviews does not enable ITA to disregard these regulations in conducting such reviews. Sections 355.28(a)(3) and 355.33(f) unquestionably require company-specific benefits to be stated in preliminary and final determinations made prior to a section 751 review if companies receive materially different benefits. It cannot have been intended that ITA, once having made such a finding, simply ignore any material differences in benefits received in conducting a section 751 review. In conducting such a review, ITA is specifically required to publish "a revised Countervailing Duty Order, including any revised bases for the assessment of duties on the merchandise." 19 C.F.R. § 355.41(d) (1983). The switch from company-specific deposit rates to an average assessment of CVDs falls within this requirement. Although the fact that an average assessment would be used was stated in both the preliminary and final results of the section 751 review, there is no indication on the record of ITA's justification for this change to an average as-

[6] 19 C.F.R. § 355.28 contains guidelines governing the issuance of preliminary determinations. Subsection (a)(3) provides that "[i]f separate enterprises have received materially different benefits, suchy differences shall also be estimated and stated." 19 C.F.R. § 355.28(a)(3) (1983).

Similarly, 19 C.F.R. § 355.33(f) contains guidelines governing the issuance of final determinations. Subsection (f) specifies that "[i]f separate enterprises have received materially different benefits, such differences shall be estimated and stated." 19 C.F.R. § 355.33(f) (1983).

Although the term "stated" is not defined, the logical inference would be that company-specific deposits rates are to be used where such material differences are found. *See* Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, *Portland Hydraulic Cement and Cement Clinker From Mexico*, 48 Fed. Reg. 43,063, 43,068 and 69 (1983) (citing § 355.33(f) and imposing company-specific deposit rates where material differences were found to exist.

sessment. Whether or not ITA's initial use of company-specific CVD deposit rates was based on a finding of "material" differences in benefits received, ITA evidently concluded that the differences were sufficiently large to warrant company-specific deposit rates.[7] To then ignore such differences in the section 751 review without explanation on the record (*e.g.*, of an unavailability of the requisite data or of a discovery that such differences, in fact, do not exist) results, as here, in a determination made contrary to law.[8] " '[T]he failure of an administrative agency to articulate the reasons for a particular decision makes meaningful review of that decision impossible.' "[9] *SCM Corp.* v. *United States*, 84 Cust. Ct. 227, 233, C.R.D. 80-2 (1980) (quoting *Public Media Center* v. *FCC*, 587 F.2d 1322, 1331-32 (D.C. Cir. 1978), quoting *American Smelting & Refining Co.* v. *FPC*, 494 F.2d 925, 945 (D.C. Cir.), *cert. denied*, 419 U.S. 882 (1974)).

III. *Deemed Liquidation*

Plaintiff's second claim is that the merchandise at issue should be liquidated by operation of law at the rate specified by plaintiff when it was entered because Customs failed to complete the annual review within the statutory deadline of twelve months. Plaintiff's argument is as follows: An entry of merchandise not liquidated within one year from the entry of such merchandise is deemed liquidated at the rate of duty, value, quantity, and amount of duties specified by the importer at the time of entry unless the Secretary extends the time for liquidation. 19 U.S.C. § 1504(a) (1982 & West Supp. 1985). One of the situations in which extension is allowed is when liquidation is suspended as required by statute. 19 U.S.C. § 1504(b)(2) (1982 & West Supp. 1985). Plaintiff argues that although liquidation in this case was originally suspended for the

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[7] It should be noted that regulations proposed by ITA would clarify the magnitude of differences in subsidies among companies that would mandate company-specific CVD deposit rates following final affirmative determinations and company-specific CVD assessments in § 751 reviews. Proposed regulations 19 C.F.R. §§ 355.22(d) (2) and (3) state that in conducting a section 751 review,

> (2) If the Secretary decides that an individual (including government-owned) producer or exporter received a significantly different net subsidy during the period, the Secretary will state in the final results an individual rate for that person, and that rate will be the basis for the assessment of countervailing duties and, except as provided in paragraph (c)(7)(iii) of this section, the cash deposit of estimated countervailing duties for that person.
>
> (3) A significant differential is a difference of the greater of at least 10 percentage points, or 25 percent, from the weighted-average net subsidy calculated on a country-wide basis.

50 Fed. Reg. 24,207, 24,226 (1985).

Proposed regulation 19 C.F.R. § 355.20(d)(3) contains the same definition of a "significant differential" in the context of final CVD determinations. 50 Fed. Reg. at 24,225. This definition of a "significant differential" would apparently have mandated company-specific deposit rates and CVD assessments here for certain companies in the final CVD determination and the § 751 review respectively. Although obviously not dispositive here, this fact is instructive as to the significance of the differences in benefits received in the case at bar, particularly in light of ITA's stated purpose, in proposing this definition, of decreasing instances in which company-specific CVD rates would be required. *Id.* at 24,211-12.

[8] From the administrative record it is evident that ITA, in conducting the 1981 § 751 review, compiled company-specific data for 1981 for the eight largest exporters to the United States of Brazilian pig iron. Thus, it cannot be argued that ITA lacked the relevant company-specific data for these companies.

[9] The parties did not brief an issue which relates to the change in duties assessed, that is ITA's inclusion in the average CVD assessment of the "subsidy" received by Cimetal. The alleged subsidy received by Cimetal was apparently based largely on its bankruptcy during 1981 and its consequent failure to repay government loans. The size of this alleged subsidy apparently skewed the average assessment. The court makes no determination as to the reasonableness of ITA's apparent conclusion that the failure to repay government loans due to bankruptcy is, in fact, a countervailable subsidy.

periodic review, *Ambassador Division of Florsheim Shoe* v. *United States,* 748 F.2d 1560, 1563 (Fed. Cir. 1984), the suspension automatically terminated at the end of the twelve-month period allowed for the review. Once a suspension terminates, an entry is liquidated within ninety days. 19 U.S.C. § 1504(d) (1982 & West Supp. 1985). Plaintiff contends that pursuant to this scheme, the merchandise was liquidated on July 4, 1983.

In several other contexts courts have recognized that statutory time periods are directory, as opposed to mandatory, when no restraint is affirmatively imposed on the doing of the act after the time specified and no adverse consequences are imposed for the delay. *Usery* v. *Whitin Machine Works, Inc.,* 554 F.2d 498, 501 (1st Cir. 1977) (Secretary of Labor's decision on petition for trade adjustment assistance); *Fort Worth National Corp.* v. *Federal Savings & Loan Insurance Corp.,* 469 F.2d 47, 58 (5th Cir. 1972) (Federal Savings and Loan Insurance Corp. decision on application for acquisition of institution insured by the Corp.); *Katunich* v. *Donovan,* 8 CIT 156, 594 F. Supp. 744, 748–50 (1984) (same program as *Usery*); *Alberta Gas Chemicals, Inc.* v. *United States,* 1 CIT 312, 315–16, 515 F. Supp. 780, 785 (1981) (Treasury determination regarding dumping complaint);[10] *Diamond Match Co.* v. *United States,* 44 Cust. Ct. 67, 74–75, 181 F. Supp. 952, 959 (1960) (notification by Customs collector of filing of protest), *aff'd,* 49 CCPA 52, C.A.D. 796 (1962). As discussed above, the statute in question in this case does not purport to restrain ITA from acting after the twelve-month period has passed. The more problematic issue is whether the statute imposes the adverse consequence for the delay, which plaintiff seeks to have imposed on ITA. The Court of Appeals for the Federal Circuit has noted "that both § 1504 and the provisions respecting countervailing duties, such as § 1675(a), were enacted as in *pari materia,* both being amendments to * * * the Tariff Act of 1930, and therefore a legislative intent to have them work harmoniously together, and for neither to frustrate the other * * * is very much to be inferred." *Florsheim,* 748 F.2d at 1565 (discussing 19 U.S.C. §§ 1504 and 1675(a)). Although these two provisions are to be read in tandem, and the suspension is to be implied, there is nothing in the statute or legislative history that compels the conclusion that the implied suspension automatically terminates at the close of the twelve-month period specified in section 751. Thus, in this situation, the court is unable to conclude that the statute imposes a penalty of deemed liquidation for the delay. Although ITA's failure to comply with the statutory time limit is not condoned by this court, this failure to act in a timely manner did not deprive ITA of jurisdiction to complete the section 751 review.[11]

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[10] "Although the legislative history cited by plaintiff shows clearly that Congress desired the expeditious handling of [these cases,] 'there is nothing in the statute which in any way suggests that the time limitation was designed to be jurisdictional.'" *Alberta Gas,* 1 CIT at 316, 515 F. Supp. at 785 (quoting *Usery,* 554 F.2d at 501).

[11] In view of the fact that the court finds that defendant acted in accordance with law as to this claim, the court believes that discussion of the numerous issues relating to exhaustion of administrative remedies is unnecessary as to the deemed liquidation issue.

IV. *Lag in Collection of Offset Tax*

Plaintiff alleges that ITA's treatment of the lag time in collection of the IPI export credit offset tax is not supported by substantial evidence and is not in accordance with law. Plaintiff contends that the benefit conferred due to the lag time between Brazil's assessment and collection of the tax is not a countervailable subsidy. In the alternative, plaintiff claims that even if this is a countervailable subsidy, ITA was not justified in imposing a CVD for this gap in collection. The CVD assessment on the IPI export credit program was based on the time at which credits were earned rather than received. To be consistent with the assessment of CVDs based on credits earned rather than received, plaintiff argues that the impact of the offset tax should be determined from the date the taxes were assessed rather than collected. Defendant offers two alternative arguments to counter plaintiff's contentions here.

Defendant first argues that plaintiff is barred from a judicial challenge to the assessment of CVDs based on export credits earned rather than credits received because plaintiff failed to raise this issue at the administrative level. ITA did not take account of this lag in offset tax collection, however, until its final decision concerning the section 751 review under consideration. Therefore, insofar as plaintiff argues for consistency in ITA's assessment of CVDs, there was no opportunity to raise the issue at the administrative level. Thus, even if the *Florsheim* decision, and other events discussed previously, had not intervened, plaintiff would not be barred from raising this issue before the court.

In the alternative, defendant asserts that its treatment of the lag in tax collection was within ITA's statutorily prescribed discretion under 19 U.S.C. § 1677(6)(C) (1982) to calculate an allowance for taxes imposed by the foreign government to offset a subsidy.[12] Thus, defendant characterizes the treatment of the lag in tax collection *not* as the imposition of a distinct CVD but rather an adjustment in the allowance for the offset tax. In enacting this provision, Congress stated that "[i]n determining the amount of offsets which are permitted, it is expected that the administrative authority will only offset amounts which are *definitively established by reliable, verified evidence.*" S. Rep. No. 249, 96th Cong., 1st Sess. at 86, *reprinted in* 1979 U.S. Code Cong. Ad. News 381, 472 (emphasis added). Defendant argues that the use of the word "may" in section 1677(6)(C) places within ITA's sole discretion the decision of whether to allow an offset in calculating the net subsidy.[13] The govern-

[12] 19 U.S.C. § 1677 (1982) reads in pertinent part as follows:

(6) Net subsidy.—For the purpose of determining the net subsidy, the administering authority *may* subtract for the gross subsidy the amount of-

* * * * * * *

(C) export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the subsidy received.

(emphasis added).

[13] To be consistent with the GATT Subsidies Code, CVDs can be imposed only to the extent "necessary to eliminate the amount of the subsidy." General Agreement on Tariff and Trade: Interpretation and Application

Continued

ment seems to argue that the manner of the calculation of the offset is, therefore, nonreviewable. The court doubts that that is truly the intent of Congress here. ITA undoubtedly has discretion in deciding whether to allow an offset, but discretion as to its manner of calculation is not unlimited. As stated by the Supreme Court, judicial review is precluded only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945) (legislative history of APA)). This court has recognized that "judicial review of final agency action is not precluded unless there is persuasive reason to believe that this was the intention of Congress." *Maple Leaf Fish Co.* v. *United States*, 5 CIT 275, 278, 566 F. Supp. 899, 902 (1983) (citing *Overton Park, supra; Data Processing Service* v. *Camp*, 397 U.S. 150, 156–57 (1970); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967) (Judicial review under APA allowed absent "persuasive reason to believe" Congress intended otherwise)).[14] In the area of international trade, agency and executive determinations have generally been found to be nonreviewable, or reviewable only for procedural irregularities, only in areas where there truly is no law to apply such as the "multifaceted judgmental decision to settle a claim," *Montgomery Ward & Co.* v. *Zenith Radio Corp.*, 673 F.2d 1254, 1262 (Fed. Cir. 1982) (Secretary of Commerce's settlement agreement in antidumping matter), and in those areas fraught with foreign affairs considerations. *See, Florsheim Shoe Co.* v. *United States*, 744 F.2d 787, 793 (Fed. Cir. 1984) (decision regarding duty-free treatment under Generalized System of Preferences is "intimately involved with foreign affairs"); *Sacilor, Acieries Et Laminoirs De Lorraine* v. *United States*, 9 CIT ——, 613 F. Supp. 364, 369–70 (1985) (allowance of additional imports under "short supply" exception is within realm of foreign affairs), *appeal docketed*, No. 85–2706 (Fed. Cir. Aug. 26, 1985). The decision in question, the manner in which an offset is calculated by ITA, falls within neither of these categories and, in fact, Congress not only specifically provided for judicial review in this area, but also gave guidance as to the type of evidence that would support an offset. The court concludes that there is "law to apply" to the manner in which ITA calculates an offset under this section and, as such, if an offset has been allowed it must be calculated in a way that does not amount to an abuse of whatever discretion is al-

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of Articles VI, XVI and XXIII, Apr. 12, 1979, part I, article 4, 31 U.S.T. 513, 524, T.I.A.S. No. 9619. Although inconsistent statutory provisions will prevail over GATT, Congress has stated that the Trade Agreements Act of 1979 was intended to be GATT consistent. *See* S. Rep. No. 249 at 1, 1979 U.S. Code Cong. & Ad. News at 387. Arguably, if there is an offset, duties are not necessary to eliminate the subsidy. Based on the arguments presented in this case, the court is not prepared to conclude that ITA is free to totally ignore offsets clearly evidenced by reliable information. This issue need not be resolved here because it is apparent in this case that, thus far, ITA has taken the offset into account in some manner.

[14] These limited exceptions to judicial review correspond (in reverse order) to the limitations on judicial review found in § 701(a) of the APA. 5 U.S.C. § 701(a) (1982). According to this provision, judicial review is allowed "except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." *Id.*; *see Heckler* v. *Chaney*, 105 S. Ct. 1649, 1654–55 (1985).

lowed. *See Montgomery Ward*, 69 CCPA at 107, 673 F.2d at *1261* ("If an action is discretionary but there is law from which a court may determine that the exercise of discretion is arbitrary or capricious, or not in accordance with law, the decision itself may be reviewed on that limited basis.")

ITA initially allowed an offset in this case because it believed that an export tax, which nullified the IPI export credit subsidy, had been assessed on June 26, 1981, by the Brazilian government. Prior to issuance of its "final review" in the second section 751 review, however, ITA discovered that the Brazilian government did not begin to collect the offsetting export tax until December 31, 1982. ITA concluded that "the lag in collection was *equivalent to an interest free loan* in the amount of the tax owed rolled over monthly until the tax was actually paid." 49 Fed. Reg. at 9,925 (emphasis added). The "loan" was deemed to have been made on the date on which the tax was due, which under current practice, was determined to be forty-five days after the end of the month in which the shipment earning premium occurred. ITA calculated the *ad valorem* benefit of this delay to be .95 percent, using the monthly Banco de Brasil rate for discounts of accounts receivable of 4.97 percent. *Id.* Plaintiff asserts that what ITA did here was to impose a CVD based on the lag in tax collection without first establishing that such lag constitutes a countervailable subsidy. At oral argument, defendant claimed, to the contrary, that its reference to the lag in collection as an "interest free loan" was merely by way of analogy and that ITA was, in fact, adjusting the offset allowed under 19 U.S.C. § 1677(6)(C) to reflect the fact that the offset tax imposed was not collected immediately rather than recognizing another form of subsidy. The administrative record provides no guidance as to whether ITA did in fact treat the lag in tax collection as a separate countervailable subsidy or whether ITA simply adjusted the offset allowed under section 1677(6)(C). Inasmuch as this matter is remanded for a related purpose, and inasmuch as plaintiff had no opportunity to comment on this late-arising issue, the court deems it appropriate for ITA to review this aspect of its order as well. It appears to the court that if ITA treats the lag in tax collection as an interest free loan justifying imposition of a CVD, it must first be established that such lag is in fact a countervailable subsidy within the meaning of the statute. *Compare, e.g., Carlisle Tire and Rubber Co.* v. *United States*, 5 CIT 229, 564 F. Supp 834 (1983) and *Cabot Corp.* v. *United States*, 9 CIT——, 620 F. Supp. 722 (1985) (limits of countervailable subsidies based on general availability). In the alternative, if ITA treats the alleged .95 percent *ad valorem* benefit of the delay between imposition and collection of the offset tax as an adjustment to the CVD offset allowed under section 1677(6)(C), ITA should address the arguments raised by plaintiff concerning its methodology.

V. *Conclusion*

For the above reasons the court concludes that the second annual review was not conducted in accordance with law. This matter is remanded to ITA for further action consistent with this opinion.

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